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TRANSCRIPT OF RECORD

IN TWO VOLUMES

SUPREME COURT OF THE UNITED STATES

October Term, 1937

No. 487

THE UNITED STATES OF AMERICA, PETITIONER

vs.

JAMES E. O'DONNELL ET AL.

Volume I

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 7, 1937
CERTIORARI GRANTED NOVEMBER 8, 1937

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 487

THE UNITED STATES OF AMERICA, PETITIONER

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Volume I

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the District Court of the United States for the Northern District of California
Northern Division.

Equity No. 2787S

UNITED STATES OF AMERICA,
Complainant,

vs.

JAMES E. O'DONNELL, JUANITA O'DONNELL, his wife, FLETCHER M. SLOSSON, DOROTHY SLOSSON, his wife, FRANK CLIFFORD MORSE, FRANCES MORSE, his wife, ELEANOR CAROLINE WHITMAN, formerly ELEANOR CAROLINE FRENCH, ALFRED WHITMAN, her husband, EDMUND BURKE, WALTER E. BURKE, as Trustee for VILLA M. BEHAN, VILLA M. BEHAN, formerly VILLA M. BURKE, S. J. SIMONS, V. M. PRICE, E. J. SULLIVAN, First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, Eighth Doe, Ninth Doe and Tenth Doe, also all other persons unknown claiming any right, title, estate, lien or interest in the real property described in this complaint adverse to complainant's title thereto,
Defendants.

BILL OF COMPLAINT

Comes now United States of America by its solicitors acting under the instructions and at the

direction of the Attorney General of the United States and brings this Bill of Complaint against the defendant and alleges:

I.

That the places of residence of the known defendants are as follows:

James E. O'Donnell, Juanita O'Donnell, his wife, Walter E. Burke, Edmund Burke, Villa M. Behan, formerly Villa M. Burke, Eleanor Caroline Whitman, formerly Eleanor Caroline French, and Alfred Whitman, her husband, reside in the city of Los Angeles, California. [1*]

Frank Clifford Morse and Frances Morse, his wife, reside at Tacoma, Washington.

Fletcher M. Slosson and Dorothy Slosson, his wife, S. J. Simons, V. M. Price and E. J. Sullivan are residents of the City of San Francisco, California.

II.

That the Complainant, United States of America, is the owner of, and since the year 1853 has occupied as part of the Mare Island Navy Yard Reservation for public, to-wit: Military and Naval purposes, and has been in possession of, the following described land, which is situated in the County of Solano, State of California and in the Northern Division of the Northern District of California, to-wit:

All that parcel and body of land known and designated as Tract No. 38 containing 1473.95

*Page numbering appearing at the foot of page of original certified Transcript of Record.

acres, more or less, shown upon the approved and accepted United States public survey map of 1923 covering Fractional Township 3 North, Range 4 West, M.D.B. and M., California, together with all accretions, natural or artificial, to said lands or any part thereof, which tract and body of land includes, as the Defendants claim, within its northerly portion, a strip or lot of ground purported to have been surveyed in the year 1856 on behalf, and under the authority of, the State of California and purportedly returned and described as State Swamp and Overflow Land Survey No. 34 containing 164.55 acres and designated as a fractional portion of the south one-half of the southeast quarter of section 10, the northeast fractional portion of the northeast quarter of section 15, the southwest fractional portion of the northwest quarter of section 14, and the northeast fractional portion of the southwest quarter of section 14 in said township, 3 north, range 4 west, M.D.B. and M.

That said last mentioned land, together with all accretions, natural or artificial, appertaining thereto or to any part thereof, is the specific land and area involved in this suit; that said last mentioned purported subdivisional descriptions designated as State Swamp and Overflow Land Survey No. 34 are null and void and that no such tracts or parcels or pieces of land exist or are delimited or show upon [2] any approved and accepted United States public land survey, map or plat.

III.

That by an instrument dated May 20, 1841, executed by Juan B. Alvarado, Constitutional Governor of the Department of California, a grant was duly made by the Government of Mexico to one Victor Castro of Mare Island which then included and now embraces the land above described; a copy of which said grant is hereto annexed, marked Exhibit "A" and made a part of this Bill of Complaint. Said instrument was filed for record in the office of the County Recorder of and for Sonoma County, California, on July 28, 1852, said Mare Island then being within and a part of said Sonoma County, and George W. P. Bissell, and William H. Aspinwall having succeeded by mesne conveyances, to the rights and title of said Victor Castro under said grant, filed in the office of the Board of Land Commissioners, empowered to ascertain and settle private land claims in the State of California, their petition seeking the confirmation to them of their title to the lands included in said grant to Victor Castro as set out herein, and such proceedings were thereupon had before said Board of Land Commissioners including the taking of evidence, that a decree was duly given, made and entered by said Board, confirming to the said Petitioners, their right and title in and to the lands included in said grant, said decree of confirmation being in the words and figures following:

"No. 307. George W. Bissell, et al, v. United States. In this case, on hearing the proofs and

allegations, it is adjudged by the Commission that the claim of the said Petitioners herein is valid, and it is therefore decreed that their application for a confirmation thereof be allowed.

"The place of the confirmation as hereby given is situate in the Bay of San Francisco and is called 'Isla DeLa Yegua' or 'Mare Island' and being an island is bounded by the water's edge.

R. Aug Thompson
S. B. Farwell, Commissioners.
George Fisher, Sec'y.

Filed in office May 8, 1855" [3]

IV.

That the said Board of Land Commissioners was vested with power and authority to make such confirmation by the Act of Congress approved March 3, 1851, (9 Stats. 631) and pursuant to the terms of section 8 of which Act said petitioners, Bissell and Aspinwall, claiming said Mare Island in California under right and title derived from the Mexican Government did present the same to the said Board of Land Commissioners, together with evidence in support of such claim and said Board thereupon did pass upon the evidence so produced and upon the evidence produced in behalf of the United States, and did determine the validity of such claim, and within thirty days after such decision did certify the same with the reasons therefor, to the District Attorney of the United States for

the District of California, in which such decision was rendered.

That pursuant to the terms of section 9 and 10 of said Act, the United States, by its District Attorney, duly presented its petition to the United States District Court for the District of California, in the District in which said land was situated, praying a review of said decision and decree of said Board of Land Commissioners, and for a decision on the validity of said claim and duly complied with the law and requirements governing such petition for review. And the said George W. P. Bissell, and William H. Aspinwall, filed their Answer thereto and thereafter such proceedings were had in such matter that on March 2, 1857, the said District Court of the United States for the District of California, duly gave and made its Order for Judgment in said cause, confirming the said grant and the said decision of the said Board of Land Commissioners, and thereafter on April 15, 1930, the District [4] Court of the United States for the Northern District of California, the successor to said Court duly gave and made its judgment and decree, confirming said decision and decree of said Board of Land Commissioners, and directing the entry of said decree nunc pro tunc as of the 2nd day of March, 1857, a copy of which decree is hereto attached marked Exhibit "B" and referred to and made a part of this bill of complaint. Defendants are remote claimants under, successors to, and in privity with, the United States of America, plaintiff and appellant in said appeal from the decision of said Board of Land

Commissioners, against which plaintiff and appellant said judgment and decree was entered with respect to sovereign and paramount title then and there asserted and claimed by said plaintiff and appellant, and defendants are bound by said decree.

V.

That the United States of America acquired the title and interest of George W. P. Bissell and William H. Aspinwall in and to the land so conveyed and confirmed to them, and also the title and interest of Mary S. McArthur in said land, as a tenant in common with the said Bissell and the said Aspinwall, by purchase for a valuable consideration, namely: $83,491.00, and received a deed of conveyance of said property executed January 4, 1853, a copy of which is hereunto annexed and marked Exhibit "C" is referred to and made a part of this Bill of Complaint. And said deed was duly filed for record and recorded in the Recorder's office of Solano County, California, on April 18, 1853, said Solano County being then and thereafter the County in which said lands were situated.

VI.

That on November 6, 1850, the President of the [5] United States by Executive Order, reserved to the United States for military and naval purposes from entry by private persons, among others, the following tract of land on San Francisco Bay:

Mare Island, [Northward to a point parallel to the Northern boundary of Mare Island].

VII.

On February 9, 1853, the Secretary of the Navy of the United States of America, acting under and in pursuance of Section 3 of the Act of August 31, 1852 (10 Stats. 104), selected the tract of land in the Bay of San Francisco, bounded by the Bay of San Pablo, the Straits of Carquinez, and Napa Creek, known as Mare Island, together with all its appendages of tule or marsh land, ordinarily reported to belong to said island and the harbors, waters and anchorages connected therewith, and necessary to the use of the same and within which is included the lands and premises described in paragraph II of this Bill, as a site for the Navy Yard and Naval Depot provided for by said Act of Congress.

Following said selections, the Secretary of the Navy on February 9, 1853, recommended to the President of the United States, that said land and premises be reserved for public use, and on February 11, 1853, President Millard Fillmore approved said recommendation and made said reservation and said reservation was communicated to the Secretary of the Interior and properly recorded.

A copy of the aforementioned selection of said tract and recommendation of the Secretary of the Navy, together with the approval of the President of the United States and his Order making such reservation is attached hereto, marked Exhibit "D" and hereby referred to and incorporated in this Bill of Complaint. From time to time, the Congress of the [6] United States of America duly approved,

ratified and confirmed said reservations and by various statutes, appropriated large sums to improve the lands comprised therein and authorized their improvement.

VIII.

That the lands and premises described in paragraph II of this Bill of Complaint are included within the boundaries and are a part of the lands and premises described and conveyed by said grant of Juan B. Alvarado, Governor of California under the rule and occupation of Mexico, to Victor Castro, confirmation of which grant was made by the Board of Land Commissioners and by the United States District Court as aforesaid, to George W. P. Bissell and William H. Aspinwall and are included within the boundaries of and are a part of the lands and premises purchased by the United States from said Bissell and Aspinwall and their co-grantor Mary S. McArthur, as hereinbefore alleged.

IX.

That ever since September 16, 1853, the United States has occupied the land described in Paragraph II of this Bill, by and through its Navy Department and officials, and has used and improved the same for military purposes in connection with the Naval Station, Navy Yard and premises of complainant, situated thereon.

That the possession of the United States of America has at all times been actual, open, adverse and exclusive and under claim of right and of absolute ownership in fee of said land, and under the

title and color and claim of title supplied by said reservations and the said deed of January 4, 1853, the said decision of the said Board of Land Commissioners of May 8, 1855, the said Order of the said District [7] Court of the United States for the District of California duly given and made March 2, 1857, and said Decree of April 15, 1930. The lands described as claimed by the Defendants in Paragraph II of this Bill, during such period and occupancy of the complainant, have been improved for military and naval purposes by the construction of buildings and improvements thereon. Said buildings and improvements are now actively and continuously used by complainant for naval and military purposes and have been so used since the construction and making thereof and there is now located upon the northerly portion of said land described in paragraph II of this Bill, a Marine Corp Rifle Range, a Submarine Repair Base, an Aviation Landing Field, a causeway to the Navy Yard, an overseas freight shipment transit shed, Navy Yard scrap bins and storage, electrified classification yard for railroad, storage corrals, moorings for destroyers, and many other improvements, buildings, structures and utilities, all of which were and are of a value exceeding $1,250,000. and used by the Complainant for the operation and activities of its Naval and Military forces.

X.

That the lands in question heretofore described in Paragraph II hereof, were claimed by the State of California, under and by virtue of the Act of Sep-

tember 28, 1850 (9 Stats. 519) commonly known as the "Swamp Land Act," by which the whole of those Swamp and Overflowed Lands, made thereby unfit for cultivation, comprising part of the public domain of the United States of America on the date of the passage and approval of said Act, and remaining unsold, were granted to the State. Said lands were purportedly surveyed in the year 1856 under authority of the State of California, and identified by such survey as Survey No. 34 and as containing 164.55 acres [8] in area, and thereafter the State of California issued its patent purporting to convey said lands included in said survey to David N. Darlington, under date of March 18, 1857, a copy of which patent is hereto annexed marked Exhibit "E" and referred to and incorporated in this Bill of Complaint.

XI.

That defendants herein named, and each of them, claim title or some right, title or interest, the exact nature and extent of said claims being unknown to complainant, in and to the lands described in said purported survey No. 34 and in Paragraph II of this Bill through and by virtue of mesne conveyances, vesting in them the purported title of the said David N. Darlington, or some part or parcel thereof. Defendants and each of them claim some right, title or interest in said real property adversely to the right and title of plaintiff, but each of said claims is

wholly without right or foundation in law or fact; that there are other persons to complainant unknown claiming some right, title, estate, lien or interest in the real property described in paragraph II of this Complaint, adverse to the complainant's ownership, and casting a cloud upon the complainant's title therein; that the claims of said persons are wholly without right or merit in law or in fact.

That complainant is without information as to the dates, tenure and contents of the instruments constituting evidences of the alleged title of the defendants other than as stated herein and is unable therefore, to set out herein such instruments held by them.

XII.

That on March 9, 1928, a purported patent was issued to the State of California, which alleged patent is in [9] effect, an attempted conveyance of the lands, secondly and lastly mentioned and described in Paragraph II of this Bill of Complaint, a copy of which said purported patent, hereto annexed is marked Exhibit "F" and is referred to and made a part of this Bill of Complaint. That said purported patent was issued under and pursuant to an order dated March 8, 1928, by the then Secretary of the Interior, directing that a patent issue to the State of California in accordance with a preemptory Writ of Mandamus, issued on March 6, 1928 out of the Supreme Court of the District of Columbia, in an action at law therein, namely No.

70,226, entitled, "The United States of America, ex rel James E. O'Donnell, relator, vs. Hubert Work, Secretary of the Interior, Respondent," a copy of which said Order is hereto attached and marked Exhibit "G" and is referred to and made a part of this Bill of Complaint, and a copy of said Writ is hereto annexed marked Exhibit "H" and is referred to and made a part of this Bill of Complaint, and thereafter the Secretary of the Interior made and filed his return to said Writ of Preemptory Mandamus, a copy of which return is hereto annexed and marked Exhibit "I" and is herein referred to and made a part of this Bill of Complaint. But Complainant says that said alleged patent to the State of California is null and void and is without force and effect and has no validity for the reason that the lands described in said purported patent were claimed and held in private ownership under and by virtue of the aforesaid grant from the Governor of Mexico at the time of the passage and approval of the above mentioned Swamp Land Act and were not a part and never had been a part of the public domain of the United States or been opened for entry by private persons or subject to the aforesaid Swamp Land grant, but have at all times since [10] the date of said Mexican grant to Victor Castro, been owned and occupied by complainant as proprietor and by those under whom the complainant claims its proprietary ownership thereof; and for the further reason that said land had been selected for and devoted to the necessary public purpose of

the United States and withdrawn from entry by private persons as alleged in Paragraphs 6 and 7 of this Bill of Complaint, long prior to the issuance of said purported patent to the State of California, and while the legal title in and to said lands was vested in the United States of America; and for the further reason that said alleged patent was not issued pursuant to the judgment, discretion or determination of said Hubert Work, as Secretary of the Interior or of the Commissioner of the General Land Office, or upon or pursuant to any finding or conclusion or judgment of said officers or either of them or of the President of the United States, which said officials are by law, charged with the duty and responsibility of caring for, protecting, disposing of and awarding patents for, or other evidences of title to, the public domain and any part thereof; and for the further reason that the descriptions in said alleged patent are null and void and designate no tracts or parcels of land shown or delimited on any approved and accepted United States public land survey, map or plat;

That the only final, recognized, approved and accepted United States public land survey, map or plat of that portion of Mare Island contained within

Fractional Township 3 North, Range 4 West, M. D. B. and M.,

and showing tracts and parcels of land therein and controlling all description of land and lots and tracts therein for disposal and other governmental purposes, is the map and township plat approved and

accepted in 1923, a true reproduc- [11] tion of which is hereto attached and marked Exhibit "J" and referred to and made a part of this Bill of Complaint;

That upon said map and plat are shown no subdivisions, tracts or parcels of land such as are mentioned in said purported patent of 1928 to the State of California, and no survey No. 34, and no lots, tracts or subdivisions corresponding to said subdivisional descriptions contained in the purported patent.

XIII.

The true names of defendants sued herein as First to Tenth Doe inclusive, and the interests claimed by them respectively to the lands described in Paragraph II of this complaint are unknown to complainant, and complainant prays that when their true names and the interest claimed by them respectively are ascertained, they may be inserted herein with the same effect as if such defendants were sued in such true names originally.

XIV.

Complainant is without adequate remedy in the premises at law; wherefore that the defendant may full, true, direct and certain answer make to each and all of the allegations and averments in this Bill of Complaint but not under oath, complainant prays:

(1) That the court adjudge and decree that complainant is the owner in fee simple, absolute, and

possessed of all of the real property described in Paragraph II of this Bill of Complaint.

(2) That the Court adjudge and decree that neither the defendants nor any of them ever acquired or now have any right, title or interest in or to the lands described in Paragraph II of this Complaint or any part thereof by reason of [12] the purported patents, conveyance, or instruments mentioned and referred to herein.

(3) That defendants be required to answer and set up the conveyances, instruments, or evidences of title under which they claim, and that the Court adjudge and decree that said conveyances and instruments through and by virtue of which defendants claim to derive a right, title and interest in the lands in question under David N. Darlington, patentee, from the State of California and his grantees, are void and that each such conveyance made to date held by the defendant, be surrendered for cancellation.

(4) That the title in and to the lands described in Paragraph II of this Bill of Complaint, be quieted in the Complainant as against all or any adverse claims of the defendants herein or any of them.

(5) That Complainant have such other, further or different relief in the premises as may be agreeable to equity and good conscience.

(6) That the Court grant to the complainant a Writ of Subpoena therein and thereby commanding the defendants to be and appear before the Court

on a date to be therein named then and there to abide by such decree as the Court shall make in the premises.

(Signed) GEO. J. HATFIELD,
United States Attorney,
Solicitor for the Complainant.[13]

United States of America,
Northern District of California,
City and County of San Francisco.—ss.

Elisha B. Carrier, Special Assistant to the United States Attorney for the Northern District of California, being first duly sworn on oath deposes and says:

That he is one of counsel for the complainant herein and that he has read the foregoing bill of complaint and knows the contents thereof and that he verily believes the same to be true.

(signed) ELISHA B. CARRIER

Subscribed and sworn to before me this 21st day of November, 1930.

[Seal] (signed) WALTER B. MALING,
Clerk U. S. District Court,
Northern District of California. [14]

EXHIBIT "A"

GRANT

Juan B. Alvarado, regular constitutional governor of the department of the Californias.

WHEREAS, Don Victor Castro, a Mexican by birth, has petitioned to this government for the ownership of the island named 'La Yegua', situated in the neighborhood of the straits of Carquinez, in consequence of which the foregoing permission was granted him by Senor Don Manuel Jimeno Casarin, for the time being in charge of this government, and in virtue of which the petitioner has repleaded his petition, proving that said island does not belong to the ownership of any individual or corporation. I have in decree of this day declared, as I do by these presents declare, Don Victor Castro owner in fee of the said island, in all its extents, conformably with the powers conferred on me by the supreme national government.

In consequence let this be delivered to the party interested, that it may serve him for a title, and for such other purposes as may be convenient.

Given in Monterey, capital of the department, on the twentieth day of the month of May, 1841.

(Signed) JUAN B. ALVARADO

[15]

EXHIBIT "B"

In the Southern Division of the United States District Court for the Northern District of California

No. 311

Transcript No. 307 Mare Island

UNITED STATES OF AMERICA,
Appellant,

vs.

G. W. P. BISSELL and W. H. ASPINWALL,
Appellees.

On appeal from the final decision of the Board of Land Commissioners to ascertain and settle private land claims in the State of California under the Act of Congress, approved on the 3rd day of March, 1851.

DECREE NUNC PRO TUNC

This cause came on to be heard at a stated term of the Court on Appeal from the final decision of the Board of Commissioners to ascertain and settle private land claims in the State of California, under the Act of Congress, approved the third of March, A. D. 1851, upon the transcript of the proceedings and the decision of said Board of Commissioners confirming the claim of the Appellees and the predecessors in interest, and the papers and evidence on which the said decision was founded; and it appearing to the Court that the said tran-

script has been duly filed according to law, and Counsel for the respective parties having been heard, it is by the Court hereby ordered, adjudged and decreed, that the said decision be and the same is hereby in all things affirmed; and it is likewise further ordered, adjudged, and decreed, that the claim of the Appellees is a good and valid claim, and that the said claim be and the same is hereby confirmed to the said "Isla De LaYegua" or "Mare Island" with its natural boundaries.

IT FURTHER APPEARING by the minutes, records and proceedings of this court, that on March 2nd, 1857, the above entitled Court made its Order duly entered in the minutes of said Court, directing the entry of a Decree of Confirmation in the above entitled matter by consent of the United States District Attorney, and that by accident, oversight, inadvertence or excusable neglect, no decree in conformity with said Order and Judgment has as yet ever been entered herein, and that the files of the Clerk of this Court contain an unsigned decree confirming the said decision of the said Board of Land Commissioners, and that this case is still pending and undecided herein;

AND IT FURTHER APPEARING, that all the right, title and interest of the Appellees herein in and to the said claim, have passed to and have been acquired by the United States, the Appellant herein, by purchase from the said Appellees, and that all persons claiming by, under, or through the Appellants or the Appellees or any of them, are chargeable with notice of this action and of everything

that has been done therein, and therefore, that no rights of third persons have intervened or could intervene. [16]

NOW, THEREFORE, on motion of Geo. J. Hatfield, Esq., United States Attorney for the Northern District of California, Attorney for said Appellant, made on the 15th day of April, 1930, that a decree be entered Nunc Pro Tunc in conformity with the said Order, and the Court now being fully advised in the premises, the said Motion is hereby granted and it is hereby ordered that this decree of confirmation in said cause confirming in all particulars the decision of said Board of Land Commissioners be entered Nunc Pro Tunc, as of the 2nd day of March, in the year 1857.

Dated in open Court this 15th day of April, 1930.

A. F. ST. SURE

United States District Judge.

Endorsement:

Filed and entered April 15, 1930, Nunc pro tunc as of March 2, 1857.

Walter B. Mailing, Clerk,

By J. A. Schaertzer, Deputy.

[Endorsed]; Entered in Vol. 25, Judg. and Decrees at Page 267. [17]

EXHIBIT "C"

To all to whom these presents shall come:

George W. P. Bissell, of the city of San Francisco, in California, William H. Aspinwall of the

city of New York, in the State of New York, and Mary S. McArthur, of the city of Baltimore, Maryland, send greetings:

Whereas, the said parties, as tenants in common, are owners and proprietors of a tract of land usually known as Mare Island in California, now recently surveyed and agreed to be purchased for the purpose of a navy yard, and for the public use, on behalf of the United States of America, and which has recently been selected for such purpose; and the interests and proportions of the said owners respectively, in the said island, are as follows, that is to say: Of the said George W. P. Bissell, fifty-eight eightieth parts and one-fourth of an eightieth part (the whole being divided into equal eightieth parts); the said William H. Aspinwall, sixteen and three-fourths eightieth parts, and the said Mary S. McArthur, as sole devisee of William P. McArthur, deceased, of the remaining five eightieth parts.

And they have agreed to convey the same to the use of the United States of America, for the consideration hereinafter expressed paid to them severally and respectively, according to their several and respective interests aforesaid with the exception hereinafter expressed.

Now these presents witness: That the said George W. P. Bissell, William H. Aspinwall and Mary S. McArthur, in consideration of the sum of eighty-three thousand four hundred and ninety-one dollars, to them paid, in proportion to their said interests respectively, on behalf of the United States

of America, the receipt of which is hereby acknowledged, have granted, bargained and sold, released and quit-claimed and by these presents do grant, bargain, sell, release, and quit-claim unto the United States, all that tract of land and island called and known as Mare Island, in the Bay of San Pablo, as recently surveyed by the board of officers of the United States sent to California for the selection of a site for the navy yard there, including all the tule or lowland, and marsh, belonging to the same, or which has ever been reputed or claimed to belong to the same, and all the waters, harbors, bays, creeks, and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging (excepting only as hereinafter is expressed), with the reversion and reversions, remainder and remainders, rents, issues and profits thereof. To have and to hold the same to the United States of America and their assigns forever, with the mutual agreements that the said grantor shall have the right of establishing a ferry to and from said island across the Napa Creek, the location of which ferry on the shore of the mainland shall be where the grantors, their heirs and assigns shall select, with the assent and approval of the Secretary of the Navy of the United States, for the time being, on the report of the officer or officers at the time representing the Navy Department at San Francisco; for the landing of which ferry, on the said island, a piece of land on the margin and shore of the said island, to be selected and located by the said grantors, their heirs and assigns, with

such assent and approval as last aforesaid; however, ferry privilege and landing place shall be subject to the following control and restrictions, on the part of the United States: [18]

That the said ferry and landing place shall at all times, for the purpose of police and the regulations of persons and things in the navy yard, be subject to such orders as the Secretary of the Navy, or the proper officer of the United States or of the Navy Department shall from time to time establish for the safety of the public property or the good government of the said navy yard and Mare Island; and also, that no building of any kind shall be erected on the landing place without such consent as aforesaid; and also if the Secretary of the Navy, for the time being shall for the security or advantage of the United States, in reference to the said public use of Mare Island, require a removal of the said ferry landing to any other convenient place on the eastern shore of said Mare Island, for the purpose of such landing place, the landing of the said ferry shall be removed to such new landing place, and the ferry privilege shall apply to such new landing place, and all other terms hereof in relation thereto; and soon, from time to time, as changes in this respect may be found necessary on part of the United States; and on every such change it shall be lawful for said grantors, their heirs and assigns to remove any buildings which they may have erected with any fixtures for the purpose of the ferry and on the direction of the Secretary of the Navy, for the time

being, it shall be the duty of the said grantors, their heirs and assigns to conform to such removal with all convenient speed. And the said grantors for themselves, according to their several interests aforesaid, and each for his heirs and assigns, and for all claiming by or under them respectively, hereby severally covenant to and with the United States of America and their assigns, that they severally, and their heirs and assigns shall and will, at the request of the United States of America or their assigns and at their expense execute all such further deeds and other assurances unto them of the premises hereby purporting to be granted, as shall be reasonably advised by their counsel learned in law.

In witness whereof the said George W. P. Bissell, by William H. Aspinwall, his attorney (by letter of attorney dated July 30th, 1852, herewith delivered), and the said William H. Aspinwall and Mary S. McArthur have hereunto set their hands and seals the fourth day of January, in the year of our Lord one thousand eight hundred and fifty-three.

G. W. P. BISSELL [Seal]
Pr. WM. H. ASPINWALL, Att'y.
WM. H. ASPINWALL, [Seal]
MARY S. McARTHUR, [Seal]

Signed, sealed and delivered
in the presence of:
WM. MARRIA,
J. O. LAWRENCE,
J. D. PRATT,
JNO. J. YOUNG,
as to Mary S. McArthur. [19]

State of New York,
New York City and County.

I, Joseph C. Lawrence, commissioner in and for the State of New York, duly appointed and commissioned by the Governor of the State of California to take the acknowledgements and proof of deeds and other instruments of writing under seal, to be used or recorded in same State of California, and to administer oaths and affirmations, do hereby certify that on the day of the date hereof before me personally came William H. Aspinwall, in his individual capacity and as the attorney in fact of George W. P. Bissell, the persons described in and who executed the foregoing deed of conveyance, and acknowledged that he had executed the same in his individual capacity and as the attorney in fact of George W. P. Bissell, one of the parties therein described, by virtue of a power of attorney, duly executed by the said George W. P. Bissell, for the purposes therein mentioned. And I further certify that the persons who made the said acknowledgment are personally known to me to be the persons described in and who executed the said deed.

Given under my hand and official seal this fourth day of January, in the year of our Lord one thousand eight hundred and fifty-three.

[Seal] JOSEPH C. LAWRENCE
Commissioner of the State of California,
in and for the State of New York.
68 Water Street, New York.

State of Maryland,
City of Baltimore.—ss.

On this 5th day of January, A. D., 1853, before me, Jabez D. Pratt, a commissioner appointed by the Governor of the State of California in and for the State of Maryland to take the proof and acknowledgment of deeds, etc., personally appeared Mary S. McArthur, one of the grantors to the within deed of conveyance and personally known to me, and having signed and sealed the same before me, acknowledged the same to be her free act and deed and desires the same might be recorded as such.

In witness whereof I have hereunto set my hand and affixed my official seal on the day and year last aforesaid.

JABEZ D. PRATT
Commissioner for California.

State of California,
County of Solano.—ss.

The foregoing instrument of writing was received by me for record on the 18th day of April, A. D. 1853, at 9 o'clock a. m.

JAS. P. VAUGHN,
County Recorder. [20]

EXHIBIT "D"

Navy Department
February 9, 1853

Sir: By the 3rd section of the act of last session, Chapter CIX, Statutes at Large, making appropria-

tions for the naval service, the Secretary of the Navy is "authorized and directed to select a site for a navy yard and naval depot in the Bay of San Francisco, in California, or neighboring waters either by purchase or reservation of public lands.

I have the honor to inform you that acting in pursuance of this authority I have it in contemplation to select Mare Island, in the Bay of San Francisco, as the site for the navy yard and depot referred to in the above act.

Negotiations have been in progress for the purchase of this island and its appendages for some time past. An investigation of the title which has been offered to the United States by those claiming to own this island has led to some doubt whether the Government does not already possess the paramount right to the occupation and use of this island. My own opinion is that whether the title should be found to exist in the United States or not it is proper that the Government should reserve the land for public use and thus assert a title which will, at least, serve to strengthen any other which may ultimately be purchased.

The act of Congress above referred to authorizes the reservation, if it may be thought expedient to make it, in case this land should belong to the public domain.

I have therefore respectfully to ask, if you should concur in the propriety of making the reservation, that you will be pleased to give the necessary orders to that end and direct that the tract of land in the Bay of San Francisco bounded by the Bay of San

Pablo, the Straits of Carquinas and Napa Creek, known as Mare Island, together with all its appendages of tule or marsh land, ordinarily reported to belong to said island, & the harbors, waters, anchorages connected therewith, and necessary to the use of the same, be reserved to the United States for public uses.

You will find accompanying this note a map or chart of the said tract called Mare Island, which will indicate its position in the Bay of San Francisco and the waters connected therewith.

I have the honor to be, with the highest respect,

Your obt. servt.

JOHN P. KENNEDY.

The President.

The President of the United States endorsed upon said paper the following:

"The reservations above recommended are hereby made and the Secretary of the Navy will communicate that fact to the appropriate department that the resolution may be properly and legally recorded.

reservation (Sgd.) MILLARD FILLMORE.

Washington, February 11, 1853." [21]

EXHIBIT "E"

United States of America, State of California:

To All To Whom These Presents Shall Come Greeting:

Whereas, under the provisions of an Act of Congress of the United States, approved the twenty-eighth day of September, A. D. one thousand eight

hundred and fifty, entitled an Act to enable the State of Arkansas and other States to reclaim Swamp Lands within their limits in which Act the manner of selecting and setting apart Swamp and Overflowed Lands are fully set forth,

And Whereas, in accordance with the provisions of the act of Congress the title of which is above recited the Legislature of the State of California on the twenty eighth day of April A. D. one thousand eight hundred and fifty five passed an Act entitled An Act to provide for the sale of the Swamp and Overflowed Lands belonging to this State which Act authorizes the location and disposal of a portion of the Swamp and Overflowed Lands donated to the State of California by the Act of Congress the title of which is above recited;

And Whereas it appears by the certificate of the Secretary of State bearing date the Eighteenth day of March A. D. one thousand eight hundred and fifty seven that he has been duly notified by the Treasurer of State of the State of California that David N. Darlington has paid one hundred and sixty four 55/100 dollars to the Treasurer of Solano County, State of California, in full payment for one hundred and sixty four 55/100 acres of Swamp and Overflowed Lands situated in said Solano County and described in the County Records of said County as follows, to-wit:

The south fractional half of the South East quarter of Section No. Ten—the North East fractional portion of the North East quarter of Section No.

Fifteen—the South West fractional portion of the North West Quarter of Section No. fourteen and the North East Fractional portion of the South West Quarter of Section No. Fourteen. The whole lying between San Pablo and Napa Bays in said County of Solano, and being in Township No. Three North Range No. Four West of Mount Diablo Meridian & Base and conforming to the U. S. Government Survey.

Now Therefore all the requirements of the Act of Congress as well as the Act of the State Legislature in relation to Swamp and Overflowed Lands having been fully complied with—he the said David N. Darlington has become entitled to a patent from the State of California, for the tract or parcel of Swamp or Overflowed Lands above described and there is hereby granted by the State of California to the said David N. Darlington and to his heirs and assigns forever the said described tract or parcel of Swamp and Overflowed Lands with the appurtenances—the said David N. Darlington his heirs and assigns to have and to hold forever the said described tract or parcel of Land with all the rights privileges and appurtenances unto the same belonging or in anywise appertaining.

In Testimony Whereof I, J. Nuby Johnson, Governor of the State of California, have caused these Letters to be made Patent and the Seal of the State of California to be hereunto affixed. Given under my hand at the City of Sacramento, this the eight-

eenth day of March in the year of our Lord A. D. One Thousand Eight Hundred and Fifty-seven. [22]

[Seal] J. NUBY JOHNSON

Attest: DAVID F. DOUGLASS,

Secretary of State.

The foregoing is a true copy of Patent recorded at the request of E. H. Sawyer, June 6th, 1879, at 30 min. past 11 A. M.

C. KNOX-MARSHALL,

Co. Recorder. [23]

EXHIBIT "F"

THE UNITED STATES OF AMERICA,

To all to whom these presents shall come, Greeting:

WHEREAS, There has been deposited in the General Land Office of the United States, an Order dated March 8, 1928, by the Secretary of the Interior, directing that a patent issue to the State of California in accordance with a writ of peremptory mandamus issued in a suit at law (No. 70,226) in the Supreme Court of the District of Columbia, entitled "The United States of America, ex rel. James E. O'Donnell, relator v. Hubert Work, Secretary of the Interior, respondent," for the following unsurveyed lands in the State of California, to-wit:

The certain lands situate in the County of Solano, State of California, namely, being all that real property and tract of land consisting of a fractional portion of the south half (S½) of the southeast

quarter (SE¼) of section ten (10); the northeast fractional portion of the northeast quarter (NE¼) of Section fifteen (15); the southwest fractional portion of the northwest quarter (NW¼) of section fourteen (14) and the northeast fractional portion of the southwest quarter (SW¼) of section fourteen (14) in township three (3) north, range four (4) west, M. D. B. & M., and embracing the premises described in California State segregation Swamp and Overflowed Land Survey No. 34, and conveyed and described by patent for the same by the State of California to David H. Darlington, March 18, 1857.

NOW, THEREFORE, KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and in accordance with said Order and writ of mandamus, HAS GIVEN AND GRANTED, and by these presents, DOES GIVE AND GRANT, unto the said State of California, in fee simple, the tracts of Land above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances thereto belonging, unto the said State of California, in fee simple, and to its assigns, forever.

IN TESTIMONY WHEREOF, I, Calvin Coolidge, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed. GIVEN under my hand, at the City of Washington, the Ninth day of March in the year of our Lord one thousand nine hundred and

twenty-eight and of the Independence of the United States the one hundred and fifty-second.

By the President:

[Seal] CALVIN COOLIDGE,

By VIOLA B. PUGH,

Secretary.

M. P. LeROY,

Recorder of the General Land Office.

Record of Patents:

Patent Number 1013379.

Government Printing Office. [24]

EXHIBIT "G"

DEPARTMENT OF THE INTERIOR

Washington

Address Only

the Secretary of the Interior

Mar - 8 1928

The Commissioner of the General

Land Office

Dear Mr. Commissioner:

The Secretary of the Interior has been served with a writ of peremptory mandamus in a suit at law (No. 70,226) in the Supreme Court of the District of Columbia, entitled The United States of America, ex rel. James E. O'Donnell, relator v. Hubert Work, Secretary of the Interior, respondent, commanding him to certify for patent to the State

of California the lands described in the writ and hereinafter described.

Accordingly, you are hereby directed to at once issue a patent to the State of California for the following unsurveyed lands:

The certain lands situate in the County of Solano, State of California, namely, being all that real property and tract of land consisting of a fractional portion of the south half (S½) of the southeast quarter (SE¼) of section ten (10); the northeast fractional portion of the northeast quarter (NE¼) of section fifteen (15); the southwest fractional portion of the northwest quarter (NW¼) of section fourteen (14), and the northeast fractional portion of the southwest quarter (SW¼) of section fourteen (14) in township three (3) north, range four (4) west, M. D. B. & M., and embracing the premises described in California State Segregation Swamp and Overflowed Land Survey No. 34, and conveyed and described by patent for the same by the State of California to David H. Darlington, March 18, 1857.

You will informally submit to the Solicitor for the Department the draft of the patent to be issued in pursuance hereof, which should recite that the lands are unsurveyed.

Very truly yours,

E. C. FINNEY,

First Assistant Secretary. [25]

EXHIBIT "H"

In the Supreme Court of the District of Columbia

At Law No. 70,226

THE UNITED STATES OF AMERICA, Ex Rel. JAMES E. O'DONNELL,

Relator,

vs.

HUBERT WORK, Secretary of the Interior,

Respondent.

WRIT OF PEREMPTORY MANDAMUS.

District of Columbia—ss.

The United States of America,

To Hubert Work, Secretary of the Interior, Greeting:

WHEREAS, it was lately and in the above entitled proceeding, represented to our Supreme Court, that you, the said Hubert Work, as Secretary of the Interior, had failed to perform the certain duty imposed on you by law, namely, that you had refused to certify for patent to the State of California the certain lands situate in the County of Solano, State of California, namely, being all that real property and tract of land consisting of a fractional portion of the South half (S½) of the Southeast Quarter (SE¼) of Section Ten (10); the Northeast fractional portion of the Northeast Quarter (NE¼) of Section Fifteen (15); the Southwest fractional portion of the Northwest Quarter (NW¼) of Section

fourteen (14), and the Northeast fractional portion of the Southwest Quarter (SW¼) of Section Fourteen (14) in Township Three (3) North, Range Four (4) West, M. D. B. & M., and embracing the premises described in California State Segregation Swamp and Overflowed Land Survey No. 34, and conveyed and described by patent for the same by the State of California to David H. Darlington, March 18, 1857, which said lands heretofore on the application of the State of California for certification for patent as passing to the State of California under and pursuant to the Act of Congress of September 28, 1850, you had duly determined as being swamp and overflowed under said Act, and had accordingly passed to said State; yet you, notwithstanding the same had refused to perform your said duty imposed on you by law, namely, to certify to said State for patent, said lands; and thereon and heretofore the said relator claiming under the title of California, sued out his Writ of Alternative Mandamus in this Court requiring you to show cause *by* Peremptory Writ should not issue; and you having duly answered, and issue having been duly joined, and the same after full hearing and consideration being submitted to the undersigned for consideration and determination, and later an order having been duly entered herein directing that this Peremptory Writ of Mandamus issue,

You are hereby commanded, and within sixty days after this Writ is served on you, to certify for

patent to the State of California the above described lands and make return to this Court concerning your action.

WITNESS the Honorable WALTER I. McCOY, a Justice of our Supreme Court in the year 1928, A. D., and on the 6th day of March, 1928. [26]

FRANK E. CUNNINGHAM, Clerk.
Clerk of the Supreme Court of the District of Columbia,
By Alf G. Beehrman, Ass't Clerk.

Let the Writ issue

WENDELL P. STAFFORD,
Justice

No objection as to form

NAT M. LACY,
Attorney for Respondent.[27]

EXHIBIT "I"

In the Supreme Court of the District of Columbia.

At Law No. 70,226.

THE UNITED STATES OF AMERICA,
Ex rel. JAMES E. O'DONNELL,
Relator,

vs.

HUBERT WORK,
Secretary of the Interior.
Respondent.

RETURN TO WRIT OF PEREMPTORY MANDAMUS.

To the Chief Justice and the Associate Justices of said Court:

The respondent, Hubert Work, as Secretary of the Interior, shows to the Court that on March 6, 1928, there issued out of the above-entitled Court a writ of peremptory mandamus which was duly served upon this respondent and which commanded official action on his part as follows, to wit:

"You are hereby commanded, and within sixty days after this writ is served on you, to certify for patent to the State of California the above described lands and make return to this Court concerning your action."

Thereupon and on March 8, 1928, he directed the Commissioner of the General Land Office to issue a patent to the State of California for the lands described in said peremptory writ of mandamus, and

on March 9, 1928, in obedience to said writ there was issued by the General Land Office Patent No. 1,013,379 in favor of the State of California giving and granting thereunto in fee simple said lands in the following language:

WHEREAS, There has been deposited in the General Land Office of the United States, an Order dated March 8, 1928, by the Secretary of the Interior, directing that a patent issue to the State of California in accordance with a writ of peremptory mandamus issued in a suit at law (No. 70,226) in the Supreme Court of the District of Columbia, entitled "The United States of America, ex rel. James E. O'Donnell, relator v. Hubert Work, Secretary of the Interior respondent," for the following unsurveyed lands in the State of California, to wit:

The certain lands situate in the County of Solano, State of California, namely, being all that real property and tract of land consisting of a fractional portion of the south half (s½) of the southeast quarter (SE¼) of Section ten (10); the northeast fractional portion of the northeast quarter (NE¼) of section fifteen (15); the southwest fractional portion of the northwest quarter (NW¼) of section fourteen (14), and the northeast fractional portion of the southwest quarter (SW¼) of section fourteen (14) in township three (3) north, range four (4) west, M. D. B. & M., and embracing the premises described in California State Segregation Swamp and Overflowed Land Survey No. 34, and conveyed and described by patent for the same

by the State of California to David H. Darlington, March 18, 1957.

That the foregoing constitutes a full and complete compliance with the mandate of this Court by respondent and nothing further [28] remains by him to be done in the premises.

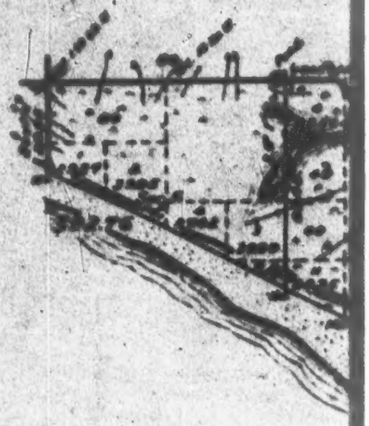
WHEREFORE respondent prays that he be exonerated and held free from any further responsibility under said writ.

EDWARD C. FINNEY,
Acting Secretary. [29]

No. 3 North Range No. 4 West Mount Diablo Meridian, California

Exhibit "J"

Frac. Township No. 3



For Knob previously [illegible]

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(ENDORSED) FI

30

[Title of Court and Cause.]

ANSWER OF DEFENDANT EDMUND BURKE

Now comes the defendant Edmund Burke, who, for his answer to the bill of complaint herein, says as follows:

I. That the residences of the defendants are as alleged in Paragraph I of the bill of complaint herein.

II. Denies that the plaintiff is the owner of the premises described in Paragraph II of the bill of complaint, or any part thereof, or has any legal or equitable interest therein, except the portion lying south of a parallel intersecting the northerly highland of Mare Island as herein detailed, premises lying northerly of said parallel, and in connection therewith this defendant alleges that they are the premises described by metes and bounds and by courses and distances in California State Segregation Survey No. 34 of swamp and overflowed lands, and the same lands described in the patent of the State of California to David N. Darlington dated March 18, 1857 and the same lands being included in a survey made by the authority of the United States pursuant to the Act App. July 23, 1866, (now Sec. 2488 R. S.), a plat of the same only being attached to plaintiff's bill marked Exhibit J, but which does not contain the field notes of said survey, and being the premises included in the patent of the United States [31] to California, issuing the 9th day of March, 1928 and being part of Island

No. 1 as depicted on this defendant's Exhibit "A", a copy of which is attached hereto and made a part of this answer, the same being an official map of plaintiff, and included in the swamp and overflowed land grant of the plaintiff to California App. Sept. 28, 1850, and in connection with all of the foregoing this defendant alleges that the officers of the land office and the Secretary of the Interior fully complied with all the terms and provisions of the Acts of July 23, 1866, of March 3, 1851 (9 Stat. 631) and (now Sec. 2488, R. S.) before the issuance of said fee simple patent of the United States to State of California, and the same duly issued in the absence of fraud, imposition, and/or mistake, and the same conveyed the legal title thereto to the State of California and is the only evidence thereof and as of the date of September 28, 1850; that said survey of said lands made by the authority of the United States under the provisions of the said Act of July 26, 1866 returned all the said premises described in plaintiff's "E" and "F" in said township 3 N. R. 4 W., M. D. B. & M. as swamp and overflowed on September 28, 1850 (9 Stat. 519), and amongst the same were the premises described in said state survey No. 34, which said description was approved and adopted by the United States of America and carried into its patent to the State of California as its terms of description; that further and in connection therewith this answering defendant disclaims any right or interest in or to tract 38 as depicted on the survey attached to plaintiff's bill of complaint south-

erly of a parallel as established by the Cession Act by the State of California to the United States of America dated May 11, 1854, and which runs East from Ship's Channel in Napa Creek, to San Pablo Bay on the west, at a point adjacent to the northerly side of the machine shop as depicted in plaintiff's Ex. map "A", attached to its bill of complaint herein; the portion of said tract northerly of said line to the line A. M. C., being the premises included in State Survey No. 34; further and in connection with all of the foregoing, this defendant alleges that all accretions, natural or artificial, appertaining or accruing to said premises included in said survey No. 34, have become [32] part thereof and said plaintiff has no right, title, or interest therein, or to any part thereof up to the line or parallel intersecting the northerly highland of Mare Island whose northerly boundary is the line of the upland of Mare Island existing in 1852 as shown on the Exhibit of this defendant, marked "B" and referred to and made part of this answer, the said line being the same as established by the survey referred to in plaintiff's Exhibit "C", but not produced by plaintiff who is in possession thereof.

III. Alleges (a) that the grant made by Juan B. Alvarado, Constitutional Governor of the Department of California, to Victor Castro was, for the reasons stated by this Court in Bouldin vs. Phelps, 30 Fed. 547, null and void; (b) that said grant, if valid, did not embrace the premises described in said survey No. 34; (c) said grant was

never finally confirmed; (d) that the nunc pro tunc order confirming said grant of Mare Island was null and void; (e) that said alleged nunc pro tunc final confirmation, if valid, was not followed by an official survey and/or patent as required by the Act of March 2, 1851 and its amendments before the issue of the federal patent to California, and in connection therewith this defendant alleges said claim of said Victor Castro was not sub judici on September 28, 1850, and in any event was inferior and subordinate in legal character to the swamp and overflowed land grant of September 28, 1850 and to the federal patent for the same by the plaintiff to California, which patent by relation is of the date of September 28, 1850.

IV. Answering Paragraph IV of the plaintiff's bill of complaint defendant deems it unnecessary to argue or to answer the legal conclusions set forth therein.

V. Answering Paragraph V of the bill herein, this defendant deems it unnecessary to answer the legal conclusions set forth therein since the conveyance therein described does not embrace the lands described in said survey No. 34 or any part thereof.

VI. Answering Paragraph VI of the plaintiff's bill, this defendant alleges (a) said executive order was void; (b) that it did not embrace the premises conveyed in said survey No. 34, or any part thereof.

[33]

VII. Alleges the executive order referred to in Paragraph VII of plaintiff's bill (a) was void;

(b) it did not embrace the premises embraced in said survey No. 34 or any part thereof.

VIII. Denies specifically each and every allegation contained in Paragraph VIII of plaintiff's bill, and in connection with the same, reiterates each and every one of the foregoing allegations.

IX. Answering Paragraph IX of plaintiff's bill, this defendant alleges that any possession of the premises embraced in survey No. 34 by plaintiff was secured by military force and trespass and without right or color of title, and that until March 9, 1928 plaintiff was without legal capacity to maintain any legal action or equitable proceeding to recover possession of said premises, or to quiet his title to or in said premises, and this defendant had no legal or equitable remedy to repel the trespass of plaintiff or its officers, agents, or attorneys; that this defendant and his predecessors in title did everything they legally could to resist the intrusions and trespasses of the plaintiff and its agents prior to the issuance of said federal patent to the State of California.

X. Admits that the lands embraced in survey No. 34 were claimed by the State of California by virtue of the Act of September 28, 1850, and that said lands were surveyed by California in 1856 under and by its authority and identified as survey No. 34, and that thereafter California issued its patent for said lands contained in said survey No. 34, under date of March 18, 1857 to David N. Darlington, and admits that a copy of said patent is attached to plaintiff's bill, and in connection there-

with this defendant alleges that by mesne conveyances from said Darlington this defendant as a tenant in common has succeeded to a 1/30 undivided interest in common thereof with his codefendants, and as such tenant in common is entitled to the possession of said premises and admits generally the allegations contained in said Paragraph 10; this answering defendant further alleges said undivided interest exceeds in value the sum of Five Thousand ($5,000.00) Dollars. [34]

XI. Answering Paragraph XI of the plaintiff's bill, this defendant reiterates all of his foregoing allegations, but deems it unnecessary to answer the legal conclusions and arguments set forth therein, and in connection therewith refers to Paragraph 12 of this answer.

XII. This defendant deems it unnecessary to answer the legal conclusions set forth in Paragraph XII of plaintiff's bill, but in connection therewith reiterates all of his foregoing allegations, and further and in connection therewith admits that March 9, 1928 the fee simple patent of the plaintiff issued to the State of California for the premises described therein, which patent inured to defendant, and which patent by relation is of the date of September 28, 1850, and further admits that a copy of the same is attached to plaintiff's bill of complaint herein marked Exhibit "F", and further and in connection therewith, this defendant alleges that the allegations in said paragraph relating to plaintiff's Exhibit "G" are redundant and immaterial, and are a col-

lateral attack on the final decree and judgment of the Supreme Court of the District of Columbia, a court of competent jurisdiction concerning the subject matter set forth, and further and in connection therewith this defendant denies said premises (No. 34) were held in private ownership by anyone under said alleged Castro grant or otherwise, either at the time of the date of the swamp land grant or otherwise, but alleges said premises were a part of the public domain on September 28, 1850, and further and in connection therewith denies that said lands were ever legally appropriated by plaintiff for public uses, and further and in connection therewith, this defendant alleges that the township survey, including the field notes and report of the surveyor, were approved and accepted by the Secretary of the Interior, and which is plaintiff's Exhibit "J", returned said premises as swamp and overflowed land as provided in and directed by the terms and provisions of said Act of July 23, 1866, which survey identified said premises as swamp and overflowed land, and which identification confirmed said patent issued by the State of California to David N. Darlington, a copy of said patent being plaintiff's Exhibit "E", and further and in connection therewith defendant alleges he [35] has by mesne conveyance succeeded to 1/30 undivided interest in said premises as a tenant in common with his co-defendants, and as such tenant in common is entitled to the possession of the same.

XIII. This defendant deems it unnecessary to

make answer to the allegations in Paragraph XIII of plaintiff's bill.

Further, this defendant admits the textual accuracy of plaintiff's Exhibits A, B, C, D, E, F, G, H, I, and J, but in connection alleges that said admission is for the matter of pleading only, this defendant reserving all objections that may attend the same as tendered by the plaintiff herein, and further and in connection therewith this defendant alleges that the survey referred to in plaintiff's Exhibit "C" and the chart or map referred to in plaintiff's Exhibit "D" have been suppressed by plaintiff and are not attached to said Exhibits or filed with them, and hence said exhibits are not complete and are subject, among other things, to such objection which defendant makes and does not waive. Further and in connection with all of the foregoing this defendant alleges that the United States Surveyor General for California in the exercise of his judgment and discretion determined that the northerly boundary of Mare Island extended from a point or station on San Pablo Bay to a point or station on Napa River, the said first station being designated on Freeman's Survey as station No. 54 to said second station No. 138; that said decision of said Surveyor General was never modified by the Secretary of the Interior and was in full force and effect on the day the said fee simple patent issued by plaintiff to the State of California, and said northern boundary line of Mare Island, which is the Southern Boundary line of said premises "No.

34", closely approximate the said parallel intersecting the northerly highlands of Mare Island as depicted on defendants Exhibit "B"; that a copy thereof is hereto attached marked Exhibit "C" and is hereby referred to and made a part of this answer. [36]

WHEREFORE, defendant prays:

1. That plaintiff's bill be dismissed.

2. That defendant's title be quieted as against plaintiff and that it be decreed he is entitled to the possession of said premises and that he be placed in possession thereof.

EDMUND BURKE
Attorney pro se

State of California,
County of Los Angeles.—ss.

EDMUND BURKE, being duly sworn, deposes and says:

That he is a defendant herein; that he has read the foregoing answer and knows the contents thereof and verily believes the same to be true.

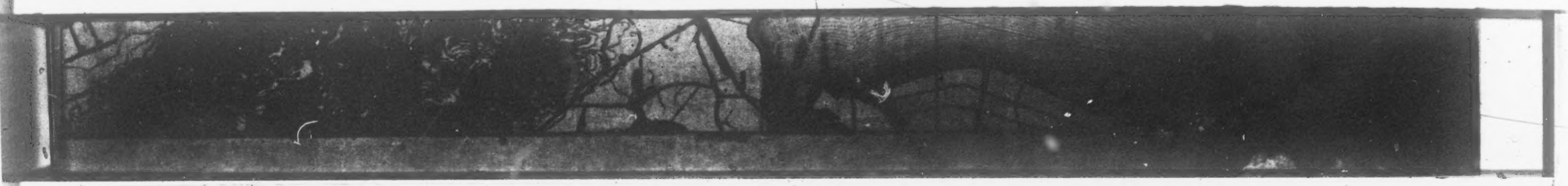
EDMUND BURKE

Subscribed and sworn to before me this 6 day of January, 1931.

[Seal] HAROLD E. THOMAS
Notary Public in and for the County of Los Angeles, State of California. [37]

4 a

CALIFORNIA
MARE ISLAND QUADRANGLE



THE TOPOGRAPHIC MAPS OF THE UNITED STATES

...Survey is making a detailed ... of the United States. This work has been in ... 1888, and its results consist of published maps of ... per cent of the country, exclusive of outlying ...

...ublished in the form of maps on ... about 14½ by 20 inches. Under the general ... the country is divided into quadrangles bounded ... of latitude and meridians of longitude. These ... mapped on different scales, the scale selected ... being that which is best adapted to ground use in ... part of the country, and consequently, though the ... ion of nearly uniform size, they represent areas ... ent. On the lower margin of each map are printed ... showing distances in feet, meters, and miles. In ... scale of the map is shown by a fraction expressing ... ratio. Some measurements on the map and ... between on the ground. For example, the scale ... 1 mile on the map (such as 1 inch, 1 foot, or 1 ... 63,360 similar units on the earth's surface.

... areas are surveyed and ... maps are ... published on special scales for special purposes, the ... topographic surveys for the United States proper and ... maps have for many years been divided into three ... classed as follows:

... of areas in which there are problems of great ... —relating, for example, to mineral development, ... or reclamation of growing areas—are made with ... accuracy to be used in the publication of maps on a ... 1 inch = one-half mile), with a contour interval of ...

... of areas in which there are problems of average ... areas, such as most of the basin of the Mississippi ... ...ains, are made with sufficient accuracy to be used ... ...ation of maps on a scale of $\frac{1}{62500}$ (1 inch = nearly ... a contour interval of 10 to 25 feet.

... of areas in which the problems are of minor ... ...ance, such as much of the mountain or desert ... ...ions of Nevada or New Mexico, are made with sufficient ... to be used in the publication of maps on a scale of ... nearly 2 miles), with a contour interval of 25 to ...

...his survey of Alaska has been in progress about ... nearly 27 per cent of its area has now been mapped. ... part of the Territory has been covered by reconnaissance maps on a scale of $\frac{1}{625000}$, or about 10 miles to an ... ...of the remaining area surveyed in Alaska has been ... on a scale of $\frac{1}{250000}$, but about 4,000 square miles ... surveyed on a scale of $\frac{1}{62500}$.

... of the Hawaiian Islands has been surveyed, and ... maps are published on a scale of $\frac{1}{62500}$.

... shown on these maps may be arranged in three ... ...ups, including seas, lakes, rivers, canals, swamps, ...ions of water; (2) relief, including mountains, ... and other features of the land surface; (3) culture ... ...ial), such as towns, cities, roads, railroads, and ... boundaries. The topographic signs used to represent these features are shown and explained below. Wherever space permits, some other maps and additional features are represented in more special ways.

All the water features are represented in blue, the smaller streams and ponds by single blue lines and the larger streams, the lakes, and the sea by blue tints. Intermittent streams—those which run dry for a large part of the year—are shown by broken blue lines and dashes.

Relief is shown by contour lines in brown, which on some maps are supplemented by shading showing the effect of light drawn from the northwest across the map symbolically, for the purpose of giving the appearance of relief and thus aiding in the interpretation of the contour lines. A contour line represents an imaginary line on the ground (a contour) every point of which is at the same distance above sea level. Such a line would be drawn on any hillside, but its position only the specific area is certain regular intervals of altitude are chosen. The line of the contours itself is a contour, the datum or zero of altitude being mean sea level. The 20-foot contour would be the shore line if the sea should rise 20 feet. Contour lines show the shape of the hills, mountains, and valleys as well as their altitude. Successive contour lines that are far apart on the map indicate a gentle slope; lines that are close together indicate a steep slope; and lines that run together indicate a cliff.

The manner in which contour lines express altitude, form, and grade is shown in the figure below.

The sketch represents a river valley that lies between two hills. In the foreground is the sea, with a bay that is partly inclosed by a hooked sand bar. On each side of the valley is a terrace line which would represent bluffs. The hill on the right has a rounded summit and gently sloping spurs separated by ravines. The spurs are connected at their lower ends by a cut cliff. The hill on the left has a steeply sloping side and a gently sloping top, and shows an inclined valley and a cut cliff. The hill on the right is represented as being forested, as indicated by the sketch by conventional trees.

The contour interval of the topographic maps is the vertical distance between successive contour lines. The smaller the contour interval the more nearly will the map represent the exact features of the ground. This interval varies according to the character of the country represented in a given map. In a flat country a map may be on a scale of 1 inch to a mile and have a contour interval of 5 feet, while in a mountainous region it may be on a scale of 1 inch to 4 miles and have a contour interval of 100 feet. Certain lines of each map are printed in heavier type than the others and are accompanied by figures showing altitude above sea level. These figures indicate the altitude of many prominent points, and certain contour lines are known as index contours. The altitudes of lakes and bench marks are given in the text. Lines which show boundaries of States, counties, and townships are also printed in heavier type than the contours. Lines which show the boundaries of land, whether public or private, and the positions of railroads, roads, and trails are printed in black type by the topographic process.

Locating and the name of each map is printed in black. Should roads, such as those of a State, county, city, land grants, railroads, or canals, not shown by conventional signs, be of sufficient importance to appear on the map, they are printed in black lines of different kinds and lengths. Should such roads be shown by double lines, one of which is conventional, they are printed in black lines. Other roads are shown by the double lines, which are printed in black, and trails are shown by dashed double lines, also printed in black.

Each quadrangle is designated by the name of a city, town, or prominent natural feature within it, and on the margin of the map are printed the names of adjoining quadrangles of which maps have been published. Over [illegible] quadrangles in the United States have been surveyed, and maps of them published. Many other quadrangles will be surveyed in the near future, and maps of them will be published as rapidly as the work can be done.

The topographic map is the type on which the geologic and mineral surveys of the quadrangles are represented. Special maps showing these features are issued together with the topographic maps for [illegible] States of the Union. Atlases of the United States have been published.

Index maps of each State and of Alaska and Hawaii, showing the area covered by topographic maps and geologic folios published by the United States Geological Survey, may be had free of charge on application to the Director, United States Geological Survey, Washington, D. C. Copies of the published topographic maps may be had at 10 cents each; some special maps are sold at different prices. A discount of 40 per cent is allowed on an order for maps amounting to $5 or more at the same time. The geologic folios are sold for 25 cents a copy each, the price being printed on the face of the folio. A discount amounting to 40 per cent is allowed on orders for 100 or more folios.

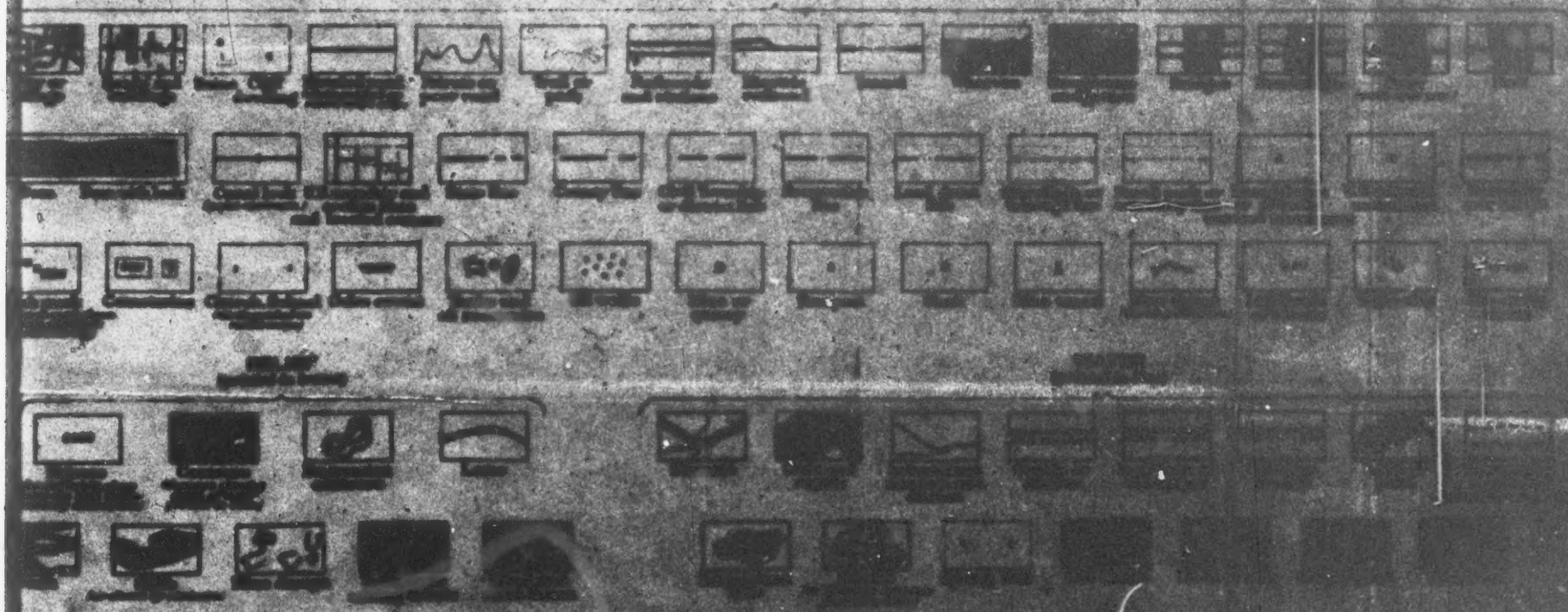
Applications for maps or folios should be accompanied by cash, draft, or money order (not postage stamps) and should be addressed to

THE DIRECTOR,
United States Geological Survey,
Washington, D. C.

January, 1904.

CONVENTIONAL SIGNS

CULTURE
(printed in black)



The United States G
topographic sales of the
progress since 1892, and
more than 40 per cent
possessions.

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the resulting maps have
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1. Surveys of areas
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2. Surveys of areas
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and its tributaries, are
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3. Surveys of areas
public importance, suc
region of Arizona or
accuracy to be used in
$\frac{1}{100}$ (1 inch = nearly 2
100 feet.

A topographic surve
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been mapped on a sca
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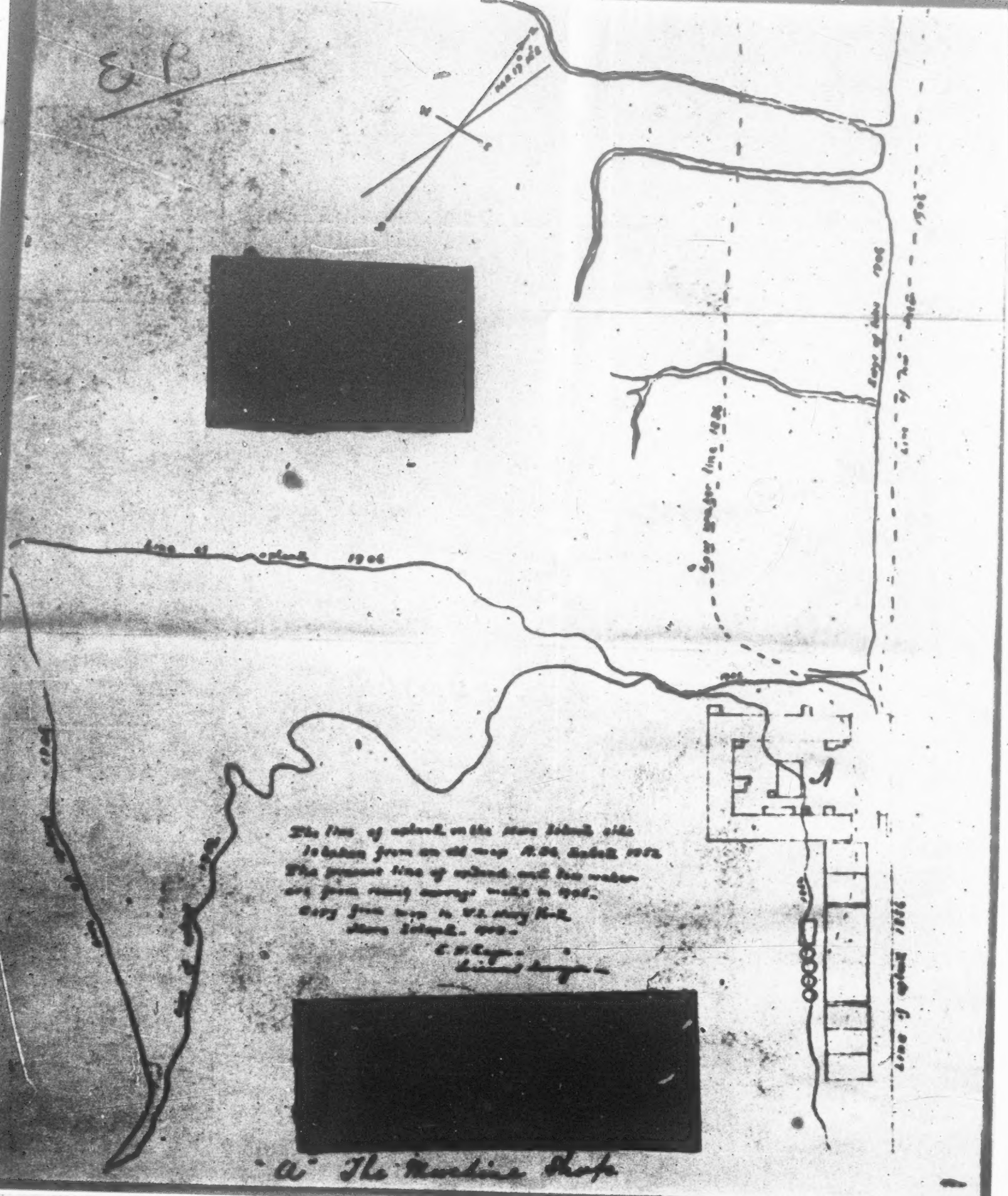
the resulting maps are

The features shown
groups—(1) water, inc
and other bodies of
hills, valleys, and other
(works of man), such



Line of upland 1906
Line of upland 1886
The line of upland on the Stone Island side
is taken from an old map N.B. Sabell 1882
The present line of upland and low water
are from recent surveys made in 1906.
Copy from map to U.S. Navy Yard
Stone Island 1906.
"A" The Machine Shop

EXHIBIT "C"
U. S. SURVEYOR'S GENERAL'S:
CALIFORNIA

No. 610 Commercial Street

San Francisco, Aug. 7, 1879

Hon. J. C. Williamson,
Com. Gen'l Land Office,
Washington, D. C.

Sir:

In reply to your letter "E" of the 25th ult. directing this office to forward a certified copy of the decree of confirmation by the W. S. District Court in the case of the claim of G. W. P. Bissell and William Harpenwall for Mare Island, I have the honor to state that although it appears from the records of the Court that a decree of confirmation was ordered to be entered on the 2d day of March, 1857, no such decree can be found. I enclose herewith a copy of the plat of survey and field notes of Freeman's Survey made in July, 1877, copy of instructions to Freeman to survey said island, copy of the certificate of advertisement, copy of the decree of confirmation by the U. S. Board of Land Commissioners, copy of a certificate from the Clerk of the U. S. District Court with extract from the minutes in the case, and a protest filed in this office July 4, 1879 by Bernard F. Hunley Esq. of Washington City, as attorney for owners.

I consider the survey incorrect in that it not only includes tracts which are properly islands in them-

selves, but also embraces a large quantity of tide land and should be limited to the area contained South of a line run across the island from the vicinity of Station 54, etc., to Station No. 138.

Your Obdt. Sevt.

THEO. WAGNER,
U. S. Surv. Gen'l. [41]

Continuation of Exhibit "C"

In reply please refer to L/471428

DEPARTMENT OF THE INTERIOR

General Land Office
Washington, Nov. 27, 1914
:As to plat and field notes

Mr. Edmund Burke,
Hotel Sutter,
San Francisco, Calif.

My dear Sir:

Replying to your telegram of the 25th inst., plat and field notes of Survey of Mare Island, Calif., received with Surveyor's General's letter of Aug. 7, 1879, cannot be found after careful search in the different divisions.

Confirming my wire of this date, I am sending you uncertified tracing of a map of Mare Island, with boundary table in margin, which, were received in 1877, shows the same acreage which as the 1879 plat did, for which no doubt you have remitted the charge—two dollars. It should be said that the map is considered incorrect, as shown in a letter by this office to the Secretary of the Interior (E J H B)

dated September 22, 1905, and was never approved.

Very respectfully,

C. M. BURD,

Assistant Commissioner.

[Endorsed]: Filed Jan. 9, 1931. [42]

[Title of Court and Cause.]

ANSWER OF DEFENDANT WALTER E. BURKE AS TRUSTEE FOR VILLA M. BEHAN, sometimes called Villa M. Burke.

Now comes the defendant Walter E. Burke, as Trustee for Villa M. Behan, sometimes called Villa M. Burke, who, for his answer to the bill of complaint herein, says as follows:

I. That the residences of defendants are as alleged in Paragraph I of the bill of complaint herein.

II. Denies that the plaintiff is the owner of the premises described in Paragraph II of the bill of complaint, or any part thereof, or has any legal or equitable interest therein, except the portion lying south of a parallel intersecting the northerly highland of Mare Island as herein detailed, premises lying northerly of said parallel, and in connection therewith this defendant alleges that they are the premises described by metes and bounds and by courses and distances in California State Segregation Survey No. 34 of swamp and overflowed lands, and the same lands described in the patent of the State of California to David N. Darlington dated

March 18, 1857 and the same lands being included in a survey made by the authority of the United States pursuant to the Act App. July 23, 1866, (now Sec. 2488 R. S.), a plat of the same only being attached to plaintiff's bill marked Exhibit J, but which does not contain the *filed* notes of said survey, and being the premises included in the patent of the United States to California, issuing the 9th day of March, 1928 and being part of Island No. 1 as depicted on this defendant's Exhibit "A", a copy of which is attached hereto and made a part of this answer, the same being an official map of plaintiff, and included in the swamp and overflowed land grant of the plaintiff to [43] California App. Sept. 28, 1850, and in connection with all of the foregoing this defendant alleges that the officers of the land office and the Secretary of the Interior fully complied with all the terms and provisions of the Acts of July 23, 1866, of March 3, 1851 (9 Stat. 631) and (now Sec. 2488, R. S.) before the issuance of said fee simple patent of the United States to State of California, and the same duly issued in the absence of fraud, imposition, and/or mistake, and the same conveyed the legal title thereto to the State of California and is the only evidence thereof and as of the date of September 28, 1850; that said survey of said lands made by the authority of the United States under the provisions of the said Act of July 26, 1866 returned all the said premises described in plaintiff's "E" and "F" in said township 3 N. R. 4 W., M. D. B. & M. as swamp and overflowed on September 28,

1850 (9 Stat. 519), and amongst the same were the premises described in said state survey No. 34, which said description was approved and adopted by the United States of America and carried into its patent to the State of California as its terms of description; that further and in connection therewith this answering defendant disclaims any right of interest in or to tract 38 as depicted on the survey attached to plaintiff's bill of complaint southerly of a parallel as established by the Cession Act by the State of California to the United States of America dated May 11, 1854, and which runs East from Ship's Channel in Napa Creek, to San Pablo Bay on the west, at a point adjacent to the northerly side of the machine shop as depicted in plaintiff's Ex. map "A", attached to its bill of complaint herein; the portion of said tract northerly of said line to the line A. M. C., being the premises included in State Survey No. 34; further and in connection with all of the foregoing, this defendant alleges that all accretions, [44] natural or artificial, appertaining or accruing to said premises included in said survey No. 34, have become part thereof and said plaintiff has no right, title, or interest therein, or to any part thereof up to the line or parallel intersecting the northerly highland of Mare Island whose northerly boundary is the line of the upland of Mare Island existing in 1852 as shown on the Exhibit of this defendant, marked "B" and referred to and made part of this answer, the said line being the same as established by the survey referred to in

plaintiff's Exhibit "C", but not produced by plaintiff who is in possession thereof.

III. Alleges (a) that the grant made by Juan B. Alvarado, Constitutional Governor of the Department of California, to Victor Castro was, for the reasons stated by this Court in Bouldin vs. Phelps, 30 Fed. 547, null and void; (b) that said grant, if valid, did not embrace the premises described in said survey No. 34; (c) said grant was never finally confirmed; (d) that the nunc pro tunc order confirming said grant of Mare Island was null and void; (e) that said alleged nunc pro tunc final confirmation, if valid, was not followed by an official survey and/or patent as required by the Act of March 2, 1851 and its amendments before the issue of the federal patent to California, and in connection therewith this defendant alleges said claim of said Victor Castro was not sub judici on September 28, 1850, and in any event was inferior and subordinate in legal character to the swamp and overflowed land grant of September 28, 1850 and to the federal patent for the same by the plaintiff to California, which patent by relation is of the date of September 28, 1850.

IV. Answering Paragraph IV of the plaintiff's bill of complaint defendant deems is unnecessary to argue or to answer the legal conclusions set forth therein. [45]

V. Answering Paragraph V of the bill herein, this defendant deems it unnecessary to answer the legal conclusions set forth therein since the convey-

ance therein described does not embrace the lands described in said survey No. 34 or any part thereof.

VI. Answering Paragraph VI of the plaintiff's bill, this defendant alleges (a) said executive order was void; (b) that it did not embrace the premises conveyed in said survey No. 34, or any part thereof.

VII. Alleges the executive order referred to in Paragraph VII of plaintiff's bill (a) was void; (b) it did not embrace the premises embraced in said survey No. 34 or any part thereof.

VIII. Denies specifically each and every allegation contained in Paragraph VIII of plaintiff's bill, and in connection with the same, reiterates each and every one of the foregoing allegations.

IX. Answering Paragraph IX of plaintiff's bill, this defendant alleges that any possession of the premises embraced in survey No. 34 by plaintiff was secured by military force and trespass and without right or color of title, and that until March 9, 1928 plaintiff was without legal capacity to maintain any legal action or equitable proceeding to recover possession of said premises, or to quiet his title to or in said premises, and this defendant had no legal or equitable remedy to repel the trespass of plaintiff or its officers, agents, or attorneys; that this defendant and his predecesosrs in title did everything they legally could to resist the intrusions and trespasses of the plaintiff and its agents prior to the issuance of said federal patent to the State of California.

X. Admits that the lands embraced in survey No. 34 were claimed by the State of California by virtue of the Act of September 28, 1950, and that

said lands were surveyed by [46] California in 1856 under and by its authority and identified as survey No. 34, and that thereafter California issued its patent for said lands contained in said survey No. 34, under date of March 18, 1857 to David N. Darlington, and admits that a copy of said patent is attached to plaintiff's bill, and in connection therewith this defendant alleges that by mesne conveyances from said Darlington this defendant as a tenant in common has succeeded to a 29/30 undivided interest in common thereof with his codefendant, and as such tenant in common is entitled to the possession of said premises and admits generally the allegations contained in said Paragraph 10; this answering defendant further alleges said undivided interest exceeds in value the sum of Five Thousand ($5,000.00) Dollars.

XI. Answering Paragraph XI of the plaintiff's bill, this defendant reiterates all of his foregoing allegations, but deems it unnecessary to answer the legal conclusions and arguments set forth therein, and in connection therewith refers to Paragraph XII of this answer.

XII. This defendant deems it unnecessary to answer the legal conclusions set forth in Paragraph XII of plaintiff's bill, but in connection therewith reiterates all of his foregoing allegations, and further and in connection therewith admits that March 9, 1928 the fee simple patent of the plaintiff issued to the State of California for the premises described therein, which patent inured to defendant, and which patent by relation is of the date of

September 28, 1950, and further admits that a copy of the same is attached to plaintiff's bill of complaint herein marked Exhibit "F" and further and in connection therewith, this defendant alleges that the allegations in said paragraph relating to plaintiff's Exhibit "G" are redundant and immaterial, and are a collateral [47] attack on the final decree and judgment of the Supreme Court of the District of Columbia, a court of competent jurisdiction concerning the subject matter set forth, and further and in connection therewith this defendant denies said premises (No. 34) were held in private ownership by anyone under said alleged Castro grant or otherwise, either at the time of the date of the swamp land grant or otherwise, but alleges said premises were a part of the public domain on September 28, 1850, and further and in connection therewith denies that said lands were ever legally appropriated by plaintiff for public uses, and further and in connection therewith, this defendant alleges that the township survey, including the field notes and report of the surveyor, were approved and accepted by the Secretary of the Interior, and which is plaintiff's Exhibit "J", returned said premises as swamp and overflowed land as provided in and directed by the terms and provisions of said Act of July 23, 1866, which survey identified said premises as swamp and overflowed land, and which identification confirmed said patent issued by the State of California to David N. Darlington, a copy of said patent being plaintiff's Exhibit "E', and further and in connection therewith defendant alleges he has by mesne

conveyance succeeded to 29/30 undivided interest in said premises as a tenant in common with his co-defendants, and as such tenant in commin is entitled to the possession of the same.

XIII. This defendant deems it unnecessary to make answer to the allegations in Paragraph XIII of plaintiff's bill.

Further, this defendant admits the textual accuracy of plaintiff's Exhibit, A, B, C, D, E, F, G, H, I, and J, but in connection alleges that said admission is for the matter [48] of pleading only, this defendant reserving all objections that may attend the same as tendered by the plaintiff herein, and further and in connection therewith this defendant alleges that the survey referred to in plaintiff's Exhibit "C" and the chart or map referred to in plaintiff's Exhibit "D" have been suppressed by plaintiff and are not attached to said Exhibits or filed with them, and hence said exhibits are not complete and are subject, among other things, to such objection which defendant makes and does not waive. Further and in connection with all of the foregoing this defendant alleges that the United States Surveyor General for California in the exercise of his judgment and discretion determined that the northerly boundary of Mare Island extended from a point or station on San Pablo Bay to a point or station on Napa River, the said first station being designated on Freeman's Survey as station No. 54 to said second station No. 138; that said decision of said Surveyor General was never modified by the Secretary of the Interior and was in full force and

effect on the day the said fee simple patent issued by plaintiff to the State of California. and said northern boundary line of Mare Island, which is the Southern Boundary line of said premises "No. 34", closely approximate the said parallel intersecting the northerly highlands of Mare Island as depicted on defendants Exhibit "B"; that a copy thereof is hereto attached marked Exhibit "C" and is hereby referred to and made a part of this answer.

WHEREFORE, defendant prays:

1. That plaintiff's bill be dismissed.

2. That defendant's title be quieted as against plaintiff and that it be decreed he is entitled to the possession of said premises and that he be placed in possession thereof.

WALTER E. BURKE
Attorney pro se [49]

State of California,
County of Los Angeles.—ss.

Walter E. Burke, being duly sworn, deposes and says:

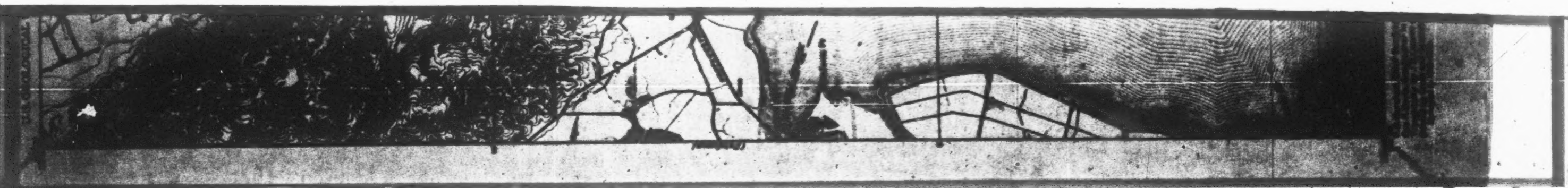
That he is a defendant herein; that he has read the foregoing answer and knows the contents thereof and verily believes the same to be true.

WALTER E. BURKE

Subscribed and sworn to before me this 6 day of January, 1931.

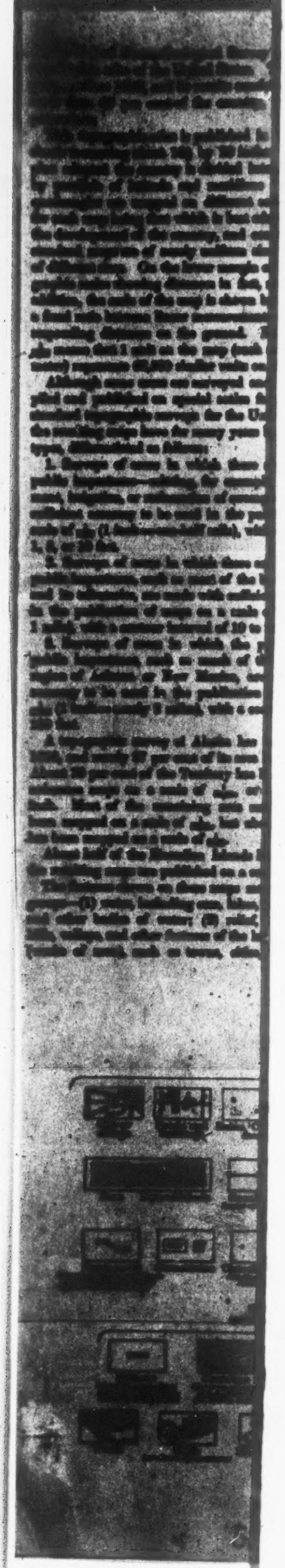
[Seal] HAROLD E. THOMAS
Notary Public in and for the County of Los Angeles, State of California. [50]

SAN PABLO
BAY



THE TOPOGRAPHIC MAPS OF THE UNITED STATES

[illegible] published in the form of maps on [illegible] by the United States Geological Survey. This work has been in progress for [illegible] years, and the published maps of several [illegible] cover the scenery, resources of outlying [illegible]



E 1

The line of upland on the west bank side is taken from an old map of the Indian reserve. The present line of upland will be washed out from many openings made in spots.
Copy from map in U.S. Army Office, Sioux Lookout, Ont.
E. M. C.
Indian Surveyor

"a" The Mandrine Shafts

EXHIBIT "C".

U. S. SURVEYOR'S GENERAL'S:
CALIFORNIA
No. 610 Commercial Street
San Francisco, Aug. 7, 1879

Hon. J. C. Williamson,
Com. Gen'l Land Office,
Washington, D. C.

Sir:

In reply to your letter "E" of the 25th ult. directing this office to forward a certified copy of the decree of confirmation by the U. S. District Court in the case of the claim of G. W. P. Bissell and William Harpenwall for Mare Island, I have the honor to state that although it appears from the records of the Court that a decree of confirmation was ordered to be entered on the 2d day of March, 1857, no such decree can be found. I enclose herewith a copy of the plat of survey and field notes of Freeman's Survey made in July, 1877, copy of instructions to *Feeman* to survey said island, copy of the certificate of advertisement, copy of the decree of confirmation by the U. S. Board of Land Commissioners, copy of a certificate from the Clerk of the U. S. District Court with extract from the minutes in the case, and a protest filed in this office July 4, 1879 by Bernard F. Hunley Esq. of Washington City, as attorney for owners.

I consider the survey incorrect in that it not only includes tracts which are properly islands in themselves, but also embraces a large quantity of tide

land and should be limited to the area contained South of a line run across the island from the vicinity of Station 54, etc., to Station No. 138.

Your Obdt. Sevt.

THEO. WAGNER,

U. S. Surv. Gen'l.

[Endorsed]: Filed Jan. 9, 1931. [55]

[Title of Court and Cause.]

ANSWER OF DEFENDANT
VILLA M. BEHAN,
sometimes called Villa M. Burke.

Now comes the defendant Villa M. Behan, sometimes called Villa M. Burke, and for her answer to the bill of complaint herein, says as follows:

That she disclaims any right, title, or interest in and to the premises described in the bill of complaint herein, except as arises through her said trustee, Walter E. Burke, and for his and her interest in the said premises this answering defendant refers to the answer herein of the said Walter E. Burke as trustee for this answering defendant.

Further defendant sayeth not.

WALTER E. BURKE
Attorney for said defendant
Villa M. Behan

[Endorsed]: Filed Jan. 9, 1931. [56]

[Title of Court and Cause.]

JOINT AND SEVERAL ANSWER OF DEFENDANTS, JAMES E. O'DONNELL AND JUANITA E. O'DONNELL.

Come now the defendants, JAMES E. O'DONNELL and JUANITA E. O'DONNELL, sued and served herein as JUANITA O'DONNELL, and who, for their joint and several answer to the Bill of Complaint filed herein, say as follows:

I.

That the residences of the defendants are as alleged in Paragraph I of the Bill of Complaint herein.

II.

Deny that the plaintiff is the owner of the premises described in Paragraph II of the Bill of Complaint, or any part thereof, or has any legal or equitable interest therein, except the portion lying south of a parallel intersecting the northerly highland of Mare Island, as herein detailed, premises lying northerly of said parallel, and in connection therewith these defendants allege that they are the premises described by metes and bounds and by courses and distances in California State Segregation Survey No. 34 of swamp and overflowed lands, and the same lands described in the patent of the State of California to David N. Darlington dated March 18, 1857, and the same lands being included in a survey made by the authority of the United

States, pursuant to the Act App. [57] July 23, 1886, (now Sec. 2488 R. S.), a plat of the same only being attached to plaintiff's bill marked Exhibit J, but which does not contain the field notes of said survey, and being the premises included in the patent of the United States to California, issuing the 9th day of March, 1928 and being part of Island No. 1, as depicted on these defendants' Exhibit "A", a copy of which is attached to the answer of defendant, EDMOND BURKE, and made a part of his answer and, by reference, attached hereto and made a part of this answer, the same being an official map of plaintiff, and included in the swamp and overflowed land grant of the plaintiff to California App. Sept. 28, 1850, and in connection with all of the foregoing, these defendants allege that the officers of the land office and the Secretary of the Interior fully complied with all the terms and provisions of the Acts of July 23, 1866, of March 3, 1851 (9 Stat. 631) and (now Sec. 2488, R. S.) before the issuance of said fee simple patent of the United States to State of California, and the same duly issued in the absence of fraud, imposition, and/or mistake, and the same conveyed the legal title thereto to the State of California and is the only evidence thereof and as of the date of September 28, 1850; that said survey of said lands made by the authority of the United States under the provisions of the said Act of July 26, 1866 returned all the said premises described in plaintiff's "E" and "F" in said township 3 N. R. 4 W., M. D. B. & M. as swamp and over-

flowed on September 28, 1950 (9 Stat. 519), and amongst the same were the premises described in said state survey No. 34, which said description was approved and adopted by the United States of America and carried into its patent to the State of California as its terms of description; that further and in connection therewith these answering defendants disclaim any right or interest in or to Tract 38, as depicted on the survey attached to plaintiff's Bill of Complaint southerly of a parallel as established by the Cession Act by the State of California to the United States of America, dated May 11, 1854, and which [58] runs East from Ship's Channel in Napa Creek, to San Pablo Bay on the west, at a point adjacent to the northerly side of the machine shop as depicted in plaintiff's Ex. map "A", attached to its Bill of Complaint herein; the portion of said tract northerly of said line to the line A. M. C., being the premises included in State Survey No. 34; further and in connection with all of the foregoing, these defendants allege that all accretions, natural or artificial, appertaining or accruing to said premises included in said survey No. 34, have become part thereof and said plaintiff has no right, title, or interest therein, or to any part thereof up to the line or parallel intersecting the northerly highland of Mare Island, whose northerly boundary is the line of the upland of Mare Island existing in 1852, as shown on the Exhibit of this defendant, marked "B" and referred to and made part of this answer, the said line being the same as established by the survey

referred to in plaintiff's Exhibit "C", but not produced by plaintiff who is in possession thereof.

III.

Allege (a) that the grant made by Juan B. Alvarado, Constitutional Governor of the Department of California, to Victor Castro was, for the reasons stated by this Court in Bouldin vs. Phelps, 30 Fed. 547, null and void; (b) that said grant, if valid, did not embrace the premises described in said survey No. 34; (c) said grant was never finally confirmed; (d) that the nunc pro tunc order confirming said grant of Mare Island was null and void; (e) that said alleged nunc pro tunc final confirmation, if valid, was not followed by an official survey and/or patent as required by the Act of March 2, 1851, and its amendments before the issue of the federal patent to California, and in connection therewith these defendants allege said claim of said Victor Castro was not sub judici on September 28, 1850, and in any event was inferior and subordinate in legal character to the swamp and overflowed land grant of September 28, 1850 and to the federal patent for the same by the plaintiff to California, [59] which patent by relation is of the date of September 28, 1850.

IV.

Answering Paragraph IV of the plaintiff's Bill of Complaint, defendants deem it unnecessasy to argue or to answer the legal conclusions set forth therein.

V.

Answering Paragraphs V of the Bill herein, these defendants deem it unnecessary to answer the legal conclusions set forth therein since the conveyance therein described does not embrace the lands described in said survey No. 34, or any part thereof.

VI.

Answering Paragraph VI of the plaintiff's Bill, these defendants allege (a) said executive order was void; (b) that it did not embrace the premises conveyed in said survey No. 34, or any part thereof.

VII.

Allege the executive order referred to in Paragraph VII of plaintiff's Bill (a) was void; (b) it did not embrace the premises embraced in said survey No. 34, or any part thereof.

VIII.

Deny specifically each and every allegation contained in Paragraph VIII of plaintiff's Bill and, in connection with the same, reiterate each and every one of the foregoing allegations.

IX.

Answering Paragraph IX of plaintiff's Bill, these defendants allege that any possession of the premises embraced in survey No. 34 by plaintiff was secured by military force and trespass and without right or color of title, and that until March 9, 1928, plaintiff was without legal capacity to maintain any legal action or equitable proceeding to re-

cover possession of said premises, or to quiet his title to or in said premises, and these defendants had no legal or equitable remedy to repel the trespass of plaintiff or its officers, [60] agents, or attorneys; that these defendants and their predecessors in title did everything they legally could to resist the intrusions and trespasses of the plaintiff and its agents prior to the issuance of said federal patent to the State of California.

X.

Admit that the lands embraced in Survey No. 34 were claimed by the State of California by virtue of the Act of September 28, 1850, and that said lands were surveyed by California in 1856 under and by virtue of its authority and identified as Survey No. 34, and that thereafter California issued its patent for said lands contained in said survey No. 34, under date of March 18, 1857 to David N. Darlington, and admit that a copy of said patent is attached to plaintiff's Bill, and, in connection therewith, these defendants allege that by mesne conveyances from said Darlington these defendants, as tenants in common, have succeeded to a 1/30th undivided interest in common thereof with their co-defendants and, as such tenants in common, are entitled to the possession of said premises and admit generally the allegations contained in said Paragraph X; these answering defendants further allege said undivided interest exceeds in value the sum of Five Thousand ($5,000.00) Dollars.

XI.

Answering Paragraph XI of the plaintiff's Bill, these defendants reiterate all of their foregoing allegations but deem it unnecessary to answer the legal conclusions and arguments set forth therein and, in connection therewith, refer to Paragraph XII of this answer.

XII.

These defendants deem it unnecessary to answer the legal conclusions set forth in Paragraph XII of plaintiff's Bill but, in connection therewith, reiterate all of their foregoing allegations and further and in connection therewith, admit that March 9, 1928, the fee simple patent of the plaintiff issued to the State of California [61] for the premises described therein, which patent inured to defendants, and which patent by relation is of the date of September 28, 1850, and further admit that a copy of the same is attached to plaintiff's Bill of Complaint herein, marked Exhibit "F", and further and in connection therewith, these defendants allege that the allegations in said paragraph relating to plaintiff's Exhibit "G" are redundant and immaterial, and are a collateral attack on the final decree and judgment of the Supreme Court of the District of Columbia, a court of competent jurisdiction, the subject matter set forth; and further and in connection therewith, these defendants deny said premises (No. 34) were held in private ownership by anyone under said alleged Castro grant or otherwise, either

at the time of the date of the swamp land grant or otherwise, but allege said premises were a part of the public domain on September 28, 1850, and further and in connection therewith, deny that said lands were ever legally appropriated by plaintiff for public uses, and further and in connection therewith, these defendants allege that the township survey, including the field notes and report of the surveyor, were approved and accepted by the Secretary of the Interior, and which is plaintiff's Exhibit "J", returned said premises as swamp and overflowed land as provided in and directed by the terms and provisions of said Act of July 23, 1866, which survey identified said premises as swamp and overflowed land, and which identification confirmed said patent by the State of California to David N. Darlington, a copy of said patent being plaintiff's Exhibit "E", and further and in connection therewith, defendants allege they have by mesne conveyance succeeded to a 1/30th undivided interest in said premises as tenants in common with their co-defendants, and, as such tenants in common, are entitled to the possession of the same.

XIII.

These defendants deem it unnecessary to make answer to the allegations in Paragraph XIII of plaintiff's Bill. [62]

Further, these defendants admit the textual accuracy of plaintiff's Exhibits A, B, C, D, E, F, G, H, I, and J, but in connection, allege that said admission is for the matter of pleading only, these de-

fendants reserving all objections that may attend the same as tendered by the plaintiff herein, and further and in connection therewith, these defendants allege that the survey referred to in plaintiff's Exhibit "C" and the chart or map referred to in plaintiff's Exhibit "D" have been suppressed by plaintiff and are not attached to said Exhibits or filed with them, and hence said exhibits are not complete and are subject, among other things, to such objection which defendants make and do not waive. Further and in connection with all of the foregoing, these defendants allege that the United States Surveyor General for California in the exercise of his judgment and discretion determined that the northerly boundary of Mare Island extended from a point or station on San Pablo Bay to a point or station in Napa River, the said first station being designated on Freeman's Survey as Station No. 54 to said second Station No. 138; that said decision of said Surveyor General was never modified by the Secretary of the Interior and was in full force and effect on the day the said fee simple patent issued by plaintiff to the State of California, and said northern boundary line of Mare Island, which is the Southern Boundary line of said premises "No. 34", closely approximate the said parallel intersecting the northerly highlands of Mare Island, as depicted on defendant Burke's Exhibit "B", a copy of which is attached to the answer of defendant, EDMOND BURKE, and made a part of his answer and, by reference, attached hereto and made a part of this answer; that a copy thereof is

hereto attached, marked Exhibit "C" and is hereby referred to and made a part of this answer.

WHEREFORE, defendants pray:

1. That plaintiff's bill be dismissed.

2. That defendants' title be quieted as against plaintiff and that it be decreed they are entitled to the possession of said premises and that they be placed in possession thereof.

KELBY & LAWSON
Attorneys for Defendants. [63]

EXHIBIT "C"

U. S. SURVEYOR'S GENERAL'S,
CALIFORNIA
No. 610 Commercial Street
San Francisco, Aug. 7, 1879

Hon. J. C. Williamson,
Com. Gen'l Land Office,
Washington, D. C.

Sir:

In reply to your letter "E" of the 25th ult. directing this office to forward a certified copy of the decree of confirmation by the U. S. District Court in the case of the claim of G. W. P. Bissell and William Harpenwall for Mare Island, I have the honor to state that although it appears from the records of the Court that a decree of confirmation was ordered to be entered on the 2d day of March, 1857, no such decree can be found. I enclose herewith a copy of the plat of survey and field notes of

Freeman's Survey made in July, 1877, copy of instructions to Freeman to survey said island, copy of the certificate of advertisement, copy of the decree of confirmation by the U. S. Board of Land Commissioners, copy of a certificate from the Clerk of the U. S. District Court with extract from the minutes in the case, and a protest filed in this office, July 4, 1879 by Bernard F. Hunley Esq. of Washington City, as attorney for owners.

I consider the survey incorrect in that it not only includes tracts which are properly islands in themselves, but also embraces a large quantity of tide land and should be limited to the area contained South of a line run across the island from the vicinity of Station 54, etc., to Station No. 138.

Your Obdt. Sevt.

THEO. WAGNER,

U. S. Surv. Gen'l. [64]

State of California,
County of Los Angeles.—ss.

James E. Kelby, being by me first duly sworn, deposes and says: that he is one of the attorneys for the defendants, James E. O'Donnell and Juanita O'Donnell, in the above entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

That he makes this verification for and on behalf

of the defendants for the reason that they are now absent from the County of Los Angeles, being the County wherein affiant resides and maintains his office.

JAMES E. KELBY

Subscribed and sworn to before me this 12th day of January, 1931.

[Seal] (Unsigned) .....

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Received copy of the within answer this 13 day of January, 1931.

GEO. J. HATFIELD,
U. S. Atty.
By E. B. C.
Attorney for Plaintiff.

Filed Jan. 16, 1931. [65]

[Title of Court and Cause.]

JOINT AND SEVERAL ANSWER OF DEFENDANTS FLETCHER M. SLOSSON, DOROTHY SLOSSON, FRANK CLIFFORD MORSE, FRANCES MORSE, ELEANOR CAROLINE WHITMAN AND ALFRED WHITMAN.

Come now the defendants Fletcher M. Slosson, Dorothy Slosson, his wife, Frank Clifford Morse, Frances Morse, his wife, Eleanor Caroline Whitman, formerly Eleanor Caroline French, and Alfred Whit-

man, her husband, and for their joint and several answer to the Bill of Complaint filed herein, say as follows:

I.

That the residences of these defendants are as alleged in Paragraph I of the Bill of Complaint herein.

II.

Deny that the plaintiff is the owner of the premises [66] described in Paragraph II of the Bill of Complaint, or any part thereof, or has any legal or equitable interest therein, except the portion lying south of a parallel intersecting the northerly highland of Mare Island, as herein detailed, premises lying northerly of said parallel, and in connection therewith these defendants allege that they are the premises described by metes and bounds and by courses and distances in California State Segregation Survey No. 34 of swamp and overflowed lands, and the same lands described in the patent of the State of California to David N. Darlington dated March 18, 1857, and the same lands being included in a survey made by the authority of the United States, pursuant to the Act App. July 23, 1866, (now Sec. 2488 R. S.), a plat of the same only being attached to plaintiff's bill marked Exhibit J, but which does not contain the field notes of said survey, and being the premises included in the patent of the United States to California, issuing the 9th day of March, 1928, and being part of Island No. 1, as depicted on these defendant's Exhibit "A", a copy of which is attached to the answer of defendant,

Walter E. Burke, as Trustee, on file herein, and made a part of his answer and, by reference, attached hereto and made a part of this answer, the same being an official map of plaintiff, and included in the swamp and overflowed land grant of the plaintiff to California App. Sept. 28, 1850, and in connection with all of the foregoing, these defendants allege that the officers of the land office and the Secretary of the Interior fully complied with all the terms and provisions of the Acts of July 23, 1866, of March 3, 1851 (9 Stat. 631) and (now Sec. 2488, R. S.) before the issuance of said fee simple patent of the United States to State of California, and the same duly issued in the absence of fraud, imposition, and/or mistake, and the same conveyed the legal title thereto to the State of California and is the only evidence there- [67] of and as of the date of September 28, 1850; that said survey of said lands made by the authority of the United States under the provisions of the said Act of July 26, 1866 returned all the said premises described in plaintiff's "E" and "F" in said township 3 N. R. 4 W., M. D. B. & M. as swamp and overflowed on September 28, 1850 (9 Stat. 519), and amongst the same were the premises described in said state survey No. 34, which said description was approved and adopted by the United States of America and carried into its patent to the State of California as its terms of description; that further and in connection therewith these answering defendants disclaim any right or interest in or to Tract 38, as depicted on the survey attached to plaintiff's Bill of Com-

plaint southerly of a parallel as established by the Cession Act by the State of California to the United States of America, dated May 11, 1854, and which runs East from Ship's Channel in Napa Creek, to San Pablo Bay on the west, at a point adjacent to the northerly side of the machine shop as depicted in plaintiff's Ex. map "A", attached to its Bill of Complaint herein; the portion of said tract northerly of said line to the line A. M. C., being the premises included in State Survey No. 34; further and in connection with all of the foregoing, these defendants allege that all accretions, natural or artificial, appertaining or accruing to said premises included in said survey No. 34, have become part thereof and said plaintiff has no right, title or interest therein, or to any part thereof up to the line or parallel intersecting the northerly highland of Mare Island, whose northerly boundary is the line of the upland of Mare Island existing in 1852, as shown on the Exhibit of said Walter E. Burke, defendant, marked "B" hereby referred to and made part of this answer, the said line being the same as established by the survey referred to in plain- [68] tiff's Exhibit "C", but not produced by plaintiff who is in possession thereof.

III.

Allege (a) that the grant made by Juan B. Alvarado, Constitutional Governor of the Department of California, to Victor Castro was, for the reasons stated by this Court in Bouldin vs. Phelps, 30 Fed. 547, null and void; (b) that said grant, if valid,

did not embrace the premises described in said survey No. 34; (c) said grant was never finally confirmed; (d) that the nunc pro tunc order confirming said grant of Mare Island was null and void; (e) that said alleged nunc pro tunc final confirmation, if valid, was not followed by an official survey and/or patent as required by the Act of March 2, 1851, and its amendments before the issue of the federal patent to California, and in connection therewith these defendants allege said claim of said Victor Castro was not sub judici on September 28, 1850, and in any event was inferior and subordinate in legal character to the swamp and overflowed land grant of September 28, 1850 and to the federal patent for the same by the plaintiff to California, which patent by relation is of the date of September 28, 1850.

IV.

Answering Paragraph IV of the plaintiff's Bill of Complaint, defendants deem it unnecessary to argue or to answer the legal conclusions set forth therein.

V.

Answering Paragraph V of the Bill herein these defendants deem it unnecessary to answer the legal conclusions set forth therein since the conveyance therein described does not embrace the lands described in said survey No. 34 or any part thereof. [69]

VI.

Answering Paragraph VI of the plaintiff's Bill, these defendants allege (a) said executive order

was void; (b) that it did not embrace the premises conveyed in said survey No. 34, or any part thereof.

VII.

Allege the executive order referred to in Paragraph VII of plaintiff's Bill (a) was void; (b) it did not embrace the premises embraced in said survey No. 34, or any part thereof.

VIII.

Deny specifically each and every allegation contained in Paragraph VIII of plaintiff's Bill and, in connection with the same, reiterate each and every one of the foregoing allegations.

IX.

Answering paragraph IX of plaintiff's Bill, these defendants allege that any possession of the premises embraced in survey No. 34 by plaintiff was secured by military force and trespass and without right or color of title, and that until March 9, 1928 defendants herein and their predecessor and predecessors in interest and title to said premises, were without legal capacity or authority or right to initiate or maintain any legal action or equitable proceedings to recover possession of said premises or any part thereof, or to quiet their title to or in said premises or any part thereof, and these defendants, until said date, had no legal or equitable remedy to repel the trespass of plaintiff or its officers, agents or attorneys; that these defendants and their predecessors in interest and title did everything they legally could do to resist the intrusions

and trespasses of the plaintiff and its agents prior to the issuance of said federal patent of said premises to the State of California. [70]

X.

Admit that the lands embraced in Survey No. 34 were claimed by the State of California by virtue of the Act of September 28, 1850, and that said lands were surveyed by California in 1856 under and by virtue of its authority and identified as Survey No. 34, and that thereafter California issued its patent for said lands contained in said survey No. 34, under date of March 18, 1857 to David N. Darlington, and admit that a copy of said patent is attached to plaintiff's Bill, and, in connection therewith, these defendants allege that by mesne conveyances from said Darlington these defendants, as tenants in common, have succeeded to a 40/100 undivided interest in common thereof with certain of their co-defendants and, as such tenants in common, are entitled to the possession of said premises and admit generally the allegations contained in said Paragraph X; these answering defendants further allege said undivided interest exceeds in value the sum of Five Thousand ($5,000.00) Dollars.

XI.

Answering Paragraph XI of the plaintiff's Bill, these defendants reiterate all of their foregoing allegations, but deem it unnecessary to answer the legal conclusions and arguments set forth therein and, in connection therewith, refer to Paragraph XII of this answer.

XII.

These defendants deem it unnecessary to answer the legal conclusions set forth in Paragraph XII of plaintiff's Bill but, in connection therewith, reiterate all of their foregoing allegations and further and in connection therewith, admit that March 9, 1928, the fee simple patent of the plaintiff issued to the State of California for the premises described therein, which patent in- [71] ured to defendants, and which patent by relation is of the date of September 28, 1850, and further admit that a copy of the same is attached to plaintiff's Bill of Complaint herein, marked Exhibit "F", and further and in connection therewith, these defendants allege that the allegations in said paragraph relating to plaintiff's Exhibit "G" are redundant and immaterial, and are a collateral attack on the final decree and judgment of the Supreme Court of the District of Columbia, a court of competent jurisdiction, the subject matter set forth; and further and in connection therewith, these defendants deny said premises (No. 34) were held in private ownership by anyone under said alleged Castro grant or otherwise, either at the time of the date of the swamp land grant or otherwise, but allege said premises were a part of the public domain on September 28, 1850, and further and in connection therewith, deny that said lands were ever legally appropriated by plaintiff for public uses, and further and in connection therewith, these defendants allege that the township survey, including the field notes and report of the surveyor, were ap-

proved and accepted by the Secretary of the Interior, and which is plaintiff's Exhibit "J", returned said premises as swamp and overflowed land as provided in and directed by the terms and provisions of said Act of July 23, 1866, which survey identified said premises as swamp and overflowed land, and which identification confirmed said patent by the State of California to David N. Darlington, a copy of said patent being plaintiff's Exhibit "E", and further and in connection therewith, defendants allege they have by mesne conveyance succeeded to a 40/100th undivided interest in said premises as tenants in common with certain of their co-defendants, and, as such tenants in common, are entitled to the possession of the same. [72]

XIII.

These defendants deem it unnecessary to make answer to the allegations in Paragraph XIII of plaintiff's Bill.

Further, these defendants admit the textual accuracy of plaintiff's Exhibits A, B, C, D, E, F, G, H, I, and J, but in connection, allege that said admission is for the matter of pleading only, these defendants reserving all objections that may attend the same as tendered by these plaintiff herein, and further and in connection therewith, these defendants allege that the survey referred to in plaintiff's Exhibit "C" and the chart or map referred to in plaintiff's Exhibit "D" have been suppressed by plaintiff and are not attached to said Exhibits or filed with them, and hence said exhibits are not com-

plete and are subject, among other things, to such objection which defendants make and do not waive. Further and in connection with all of the foregoing, these defendants allege that the United States Surveyor General for California in the exercise of his judgment and discretion determined that the northerly boundary of Mare Island extended from a point or station on San Pablo Bay to a point or station in Napa River, the said first station being designated on Freeman's Survey as Station No. 54 to said second Station No. 138; that said decision of said Surveyor General was never modified by the Secretary of the Interior and was in full force and effect on the day the said fee simple patent issued by plaintiff to the State of California, and said northern boundary line of Mare Island, which is the Southern Boundary line of said premises, "No. 34", closely approximate the said parallel intersecting the northerly highlands of Mare Island, as depicted on defendant Walter E. Burke, Trustee's Exhibit "B", a copy of which is attached to the answer of said defendant, Walter E. Burke, Trustee, and made a part of his answer and, by [73] reference, attached hereto and made a part of this answer; that a copy thereof is hereto attached, marked Exhibit "C" and is hereby referred to and made a part of this answer.

WHEREFORE, defendants pray:

1. That plaintiff's bill be dismissed.

2. That defendants' title be quieted as against plaintiff and that it be decreed they are entitled to

the possession of said premises and that they be placed in possession thereof.

ATHEARN, CHANDLER & FARMER
and FRANK R. DEVLIN,
Attorneys for said Defendants.[74]

State of California,
City and County of San Francisco—ss.

Fletcher M. Slosson, being first duly sworn, deposes and says:

That he is one of the defendants named in the above entitled action; that he has read the within and foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

FLETCHER M. SLOSSON.

Subscribed and sworn to before me this 24th day of January, 1931.

[Seal] M. C. COLLINS,
Notary Public in and for the City and County of San Francisco, State of California. [75]

EXHIBIT "C"

U. S. SURVEYOR'S GENERAL'S:
CALIFORNIA
No. 610 Commercial Street.
San Francisco, Aug. 7, 1879.

Hon. J. C. Williamson,
Com. Gen'l Land Office,
Washington, D. C.

Sir:

In reply to your letter "E" of the 25th ult. directing this office to forward a certified copy of the decree of confirmation by the U. S. District Court in the case of the claim of G. W. P. Bissell and William Harpenwall for Mare Island, I have the honor to state that although it appears from the records of the Court that a decree of confirmation was ordered to be entered on the 2d day of March, 1857, no such decree can be found. I enclose herewith a copy of the plat of survey and field notes of Freeman's Survey made in July, 1877, copy of instructions to Freeman to survey said island, copy of the certificate of advertisement, copy of the decree of confirmation by the U. S. Board of Land Commissioners, copy of a certificate from the Clerk of the U. S. District Court with extract from the minutes in the case, and a protest filed in this office July 4, 1879, by Bernard F. Hunley, Esq. of Washington City, as attorney for owners.

I consider the survey incorrect in that it not only includes tracts which are properly islands in them-

selves, but also embraces a large quantity of tide land and should be limited to the area contained South of a line run across the island from the vicinity of Station 54, etc., to Station No. 138.

Your Obdt. Sevt.

THEO. WAGNER,
U. S. Surv. Gen'l. [76]

[Endorsed]: Service of the within by copy is hereby admitted this 24th day of January A. D. 1931.

GEO. J. HATFIELD,
Attorney for _____

Filed Jan. 26, 1931. [77]

[Title of Court and Cause.]

STIPULATION FOR AMENDED PLEADINGS.

IT IS HEREBY STIPULATED and agreed by and between the attorneys for the respective parties, that the defendants may file amended answer or amended answers herein, and also that complainant's bill may be amended upon its face by striking out the concluding words of paragraph VI on page 6, lines 5 and 6, as follows to-wit: "Northward to a point parallel to the Northern boundary of Mare Island"; and by substituting the word "reservation" for the word "resolution" at the conclusion of com-

plainant's Exhibit D upon page 21, line 32 of the bill of complaint.

Dated: March 18, 1931.

GEO. J. HATFIELD,
United States Attorney.
I. M. PECKHAM,
Asst. United States Attorney.
E. B. CARRIER,
Special Assistant to United States Attorney,
Attorneys for comp'ainant. [78]

WALTER E. BURKE, pro se
EDMUND BURKE pro se
KELBY AND LAWSON,
Attorneys for defendants James E. O'Donnell, Juanita O'Donnell, his wife, Fletcher M. Slosson, Dorothy Slosson, his wife, Frank Clifford Morse, Frances Morse, his wife, Eleanor Caroline Whitman, formerly Eleanor Caroline French, Alfred Whitman, her husband, Edmund Burke, Walter E. Burke, as Trustee for Villa M. Behan, Villa M. Behan, formerly Villa M. Burke.

[Endorsed]: Filed Mar. 18, 1931. [79]

[Title of Court and Cause.]

ANSWER TO BILL OF COMPLAINT AS AMENDED.

ANSWER OF DEFENDANTS, JAMES E. O'DONNELL, FLETCHER M. SLOSSON, FRANK CLIFFORD MORSE, ELEANOR CAROLINE WHITMAN, EDMUND BURKE AND WALTER E. BURKE, AS TRUSTEE, ETC.

These defendants first objecting to the sufficiency of the Bill of Complaint (a) that it does not state facts sufficient to constitute a cause of action against any or all of the defendants, (b) that it does not state facts cognizable in equity, (c) that the plaintiff has not legal capacity to maintain this suit, and reserving such objections to be first disposed of, for their joint and separate answer to the Bill of Complaint, as amended herein, allege as follows:

I.

Admit the allegations contained in Paragraph I thereof.

II.

Deny plaintiff is the owner or entitled to the possession of the premises described in plaintiff's Bill, Paragraph II, and in California State Segregation Survey No. 34 set forth in plaintiff's Exhibit "F", or any part thereof, of which premises these defendants allege they are the owners and entitled to the possession as tenants in common, as hereinafter detailed, the value of which is in excess

of Five Thousand Dollars ($5,000.00). That attached hereto, marked Exhibit I is a copy of the survey, [80] field notes and map of California Segregation Survey No. 34 (and State Survey No. 569), which is referred to and made a part of this answer. (Both showing the boundaries of the S & O Tract No. 34) and these defendants refer to plaintiff's Ex. "F" for a further description of said premises.

Further in answer to Paragraph II, defendants deny that such premises are not delimited or shown on any approved and accepted United States Public Land Survey, map and/or plat, and further in connection with the same refer to Paragraph 12 of this answer to the same and for the statement of the fact concerning the same.

III.

Alleges that the claimed grant of Mare Island by Juan B. Alvarado to Victor Castro, dated May 20, 1841, is void on its face, since it purports to grant an interdicted island (Bouldin vs. Phelps, 30 Fed. 547); further deny that any grant was ever made to said Castro as alleged in Bill herein or otherwise, or ever recorded in the office of the Recorder of Sonoma County, and that the alleged grant was a forgery and to the knowledge of plaintiff when its Bill herein was filed.

(a) That the decree of confirmation by the U. S. Land Commission is void on its face.

IV.

Allege that prior to the time of said claimed confirmation of Mare Island to Mesne, successors of

said Castro, said void confirmees had parted with their interest in said premises and the proceeding terminated on June 4, 1853, by their conveyance of said premises to plaintiff, who accepted the same, and said premises included Mare Island to the water's edge, if such grant was valid, but did not include any portion of the premises included in State Segregation Surveys Nos. 34 and 569, or either of them, or any land north of a line drawn from Station 54 to Station [81] 138 as depicted in Freeman's Survey. (Ex. "N")

(b) That the appeal of the United States from said alleged decree of confirmation, as alleged in said Paragraph, was null and void as were all the proceedings thereinafter had therein.

(c) That the exparte nunc-pro-tunc decree of confirmation entered in this Court therein is null and void on its face.

V.

That the conveyance of Bissell et als to the United States, dated June 4, 1853 is null and void on its face.

VI.

That the order of the President, dated November 6, 1850 reserving Mare Island for public use is null and void, on its face.

VII.

That the order of the President dated February 9, 1853, reserving Mare Island with all its appendages of tule and marsh, ordinarily reported to belong to Mare Island is void on its face.

VIII.

Deny the said premises purporting to be so reserved thereby for public use, or as part of the premises described in said grant and confirmations are included in the same or either or any of the same, or in other of such reservations; but on the contrary, allege:

(a) That said premises are a part of Island No. 1 embraced in said Surveys Nos. 34 and 569 as depicted on the official maps of plaintiff, copies of which marked respectively A and B are hereto attached and made a part of this answer, and as reported and depicited in the approved survey and plat of Township 4 N R 4 W, M.D.B. & M. accepted November 8, 1923 and were a part of the public domain on September 28, 1850, and were S. & O. [82] lands embraced in the S. & O. land grant to California at that date.

(b) That said premises were not (or any part thereof) within the exterior boundaries of Mare Island, but north of the Northern boundary of Mare Island as established officially by United States Surveyor General Wagner, within his jurisdiction to so establish; that a copy of said decision is hereto attached, and marked Ex. "M", and made a part of this answer; that the Survey to which he referred is hereto attached, marked Exhibit "N" and made a part of this answer.

IX.

Deny each and every allegation in Paragraph 9.

X.

Deny each and every allegation set forth in Paragraph 10 of said Bill of Complaint, and further in connection with all of the foregoing, these defendants further allege:

(a) Deny the possession of plaintiff, if any, of said premises No. 34, or any part thereof, were or are adverse since the legal title of said premises did not pass from the United States and inure to these defendants, until March 9, 1928, which is the date of defendants' legal capacity, and which date the patent of the United States therefor issued to California.

(b) Deny the possession of plaintiff, if any, was under the title and/or color and claim of title supplied by the said deed of June 4, 1853, or by the decree of the Board of Land Commissioners and/or by said nunc-pro-tunc decree or otherwise, and they deny any information sufficient to form a belief concerning the extent or value of the improvements made on said premises by plaintiff, if any, but in connection therewith allege the plaintiff made same, if any, as a trespasser on said premises and without claim or right or color of title, and without and against the consent of the defendants or their predecessors in [83] title, and allege that plaintiff is without right or equity in said premises, but is proceeding as a trespasser and by force of arms.

XI.

Admit the allegations set forth in Paragraph 10 of the Bill of Complaint, but in connection therewith allege that the statement in the said patent that the said lands were unsurveyed at the date of issue of said patent is untrue and was and is an error of law which is refuted by the record in which said patent is based as detailed in Paragraph 13 of this answer.

XII.

These defendants admit they claim an interest in said premises of undivided interest as tenants in common with others as the record discloses, and allege that as such co-tenants, they are entitled to the possession of said premises under Mesne conveyances from the State of California, as successors of plaintiff, extending to him under the S. & O. land grant to California of September 28, 1850.

XIII.

Allege that the patent of the United States with its recitals and descriptions issued to California March 9, 1928 determined the land was a part of the public domain on September 28, 1850, and not included in said alleged grant to Castro; deny the lands were claimed and held in private ownership by virtue of the Castro grant or otherwise; admit the lands had never been opened for entry or purchase by private persons, and especially so after September 28, 1850; deny said lands were not subject to said swamp lands grant, and in connection therewith, allege that all of the S. & O. lands within

the state were included in the swamp land grant of September 28, 1850, including the lands described in said State surveys Nos. 34 and 569; defendants allege they deem it unnecessary to answer the legal conclusions set [84] forth arguendo in said paragraph.

(a) Further answering Paragraph 12, of the Bill of Complaint, these answering defendants allege the fact in connection, identification and patenting of said premises is as follows:

Prior to September 16, 1914, California applied to the Commissioners of the General Land Office for the certification to it of the lands indefinitely represented as swamp and overflows on the plats of Townships 3 and 4, N R 4 W, M.D.M. approved March 4, 1863 (Ex. F and "G") pursuant to R. S. Sec. 2488; and the application was rejected by the Commissioner of the General Land Office on the ground that the plats did not define the extent of any body of land "notoriously and obviously swamp and overflowed", as specified in Sec. R. S. 2488, "or furnish information indicating that any particular part, great or less, of the lands claimed were wet and unfit for cultivation".

(b) That thereon, on or about February 15, 1915, the said commissioner pursuant to said Sec. R. S. 2488 Paragraph 5, approved instructions for the examination and investigation by the United States Surveyor General for California of the swamp and overflowed land in said townships claimed by California and to identify the location and character of the lands embraced in Segregation Surveys Nos.

34 and 569, which lands were claimed by California as S. & O. lands under said application.

(c) That thereon and pursuant to said instructions, said examination was made by the United States Surveyor General and later he reported to the Secretary of the Interior that said lands embraced in said State Surveys were swamp and overflowed, and thereon the Secretary of the Interior determined that such was the fact and said lands should be certified to California under its application made pursuant to said approved plats of March 4, 1863, (Exs. F and G), and that said premises No. 34 [85] was contiguous to Mare Island, but apart from it and said Secretary had previously approved of the plat of Township 4 N. R. 4 W, and thereupon the lands embraced in said State surveys were patented to California.

XIV.

That attached hereto and referring to and made part of this answer is Ex. "A" (Coast Survey Chart), Ex. "B", U. S. Geological Survey; Ex. "H", the approved Township plat of Township 4 N. R. 4 W, M.B.D. & M., each of said three exhibits marking said premises as included within the exterior boundaries of Island No. 1, and designating said areas as Island No. 1, and each depicting Island No. 1 and Mare Island as separate tracts of land and separate islands, and which said plats and maps and surveys were official acts of the plaintiff, duly authorized by law, and which said Ex. "H" was approved by the Secretary of the Interior; Exhibit "D", Plat of Township 3 N. R. 4 W. (before revi-

sion); Ex. "E" ibid. after revision; Ex. "G", Plat approved March 4, 1863, Township 3 N. R. 4 W., under which California made its application for certification of S. & O. lands; Ex. "H" ibid. Plat Township 4 N. R. 4 W., under which California applied for certification; Ex. "I", California State Survey No. 34, maps and field notes; Ex. "J" State Survey No. 569 ibid.; Ex. "K", Sloat Survey of Mare Island; Ex. "O", showing line of upland of Mare Island in 1852; Ex. "L", Mandamus record referred to in Bill and made part of federal patent by reference and other exhibits appear below.

XV.

That the imposing on Ex. "E" of the delimitation of the premises purporting to have reserved for public uses by said presidential orders by the Secretary, was a null and void act since both of said orders were void on their faces and without legal effect; that at the time of the making of said orders, the equitable title to the premises in controversy had passed under a grant in praesenti, to the State of California under the swamp and overflowed [86] land grant of September 28, 1850, and in addition to be a grant in praesenti, the same was a contract between the United States and California, which has inured to these answering defendants and their co-defendants, as their interests may appear, and the President of the United States was without authority in law to make such or either of said executive orders.

Further answering said Bill of Complaint, defend-

ants deny that Ex. "A" of plaintiff's bill is a copy of the grant to Castro; allege said purported grant was a forgery, and further deny that the same was ever presented to said United States Land Commissioner for confirmation, or that it was ever confirmed.

Admit that Plaintiff's Ex. "D" is a true copy of the original. Admit the writing and accuracy of Ex. "E" of Plaintiff's Bill; admit likewise of Plaintiff's Ex. "F".

XVI.

The defendants further allege that said alleged grant was never finally confirmed to said Victor Castro or to his successors in interest, if any there be; that the area or boundaries of said tract of land has never been determined or ascertained by survey thereof by the United States Survyor General for California, or has patent thereof issued to any alleged confermee or confermees pursuant to the Act of Congress of July 1, 1864, which said statute was in force on and before March 9, 1928.

XVII.

That by reason of the said decision of the Secretary of the Interior identifying the said premises as swamp, the said State patent to David N. Darlington was confirmed as of the date of its issue pursuant to the provisions of the Act of July 23, 1866, which said confirmation has inured to these accusing defendants.

That by reason of the purchase of said premises by the United States subsequent to September 28,

1850, any title or [87] interest acquired by the grantee thereby has inured to the defendants and their co-tenants in common, and the Plaintiff is estopped to assert the same against the defendants, the same being subordinate to the said S. & O. land grant of September 28, 1850 and to the Federal patent to California therefor.

XVIII.

Reiterating all the foregoing matters, these answering defendants allege as follows:

(a) That the said claim of Victor Castro was not reserved by the treaty of Hidalgo Guadalupe, or by statute of the United States on September 28, 1850.

(b) That the claim of the said Victor Castro was not sub judici on September 28, 1850, or prior thereto, but was subject to dosposition otherwise by the United States on said date and the plaintiff is estopped to deny the validity of its said grant.

(c) That equitable title of California which has inured to these defendants is superior to the alleged title of plaintiff.

(d) That the said patent of the United States to California which by relation, is of the date of September 28, 1850, is superior to the said alleged subsequent decrees of confirmation and superior to said executive orders purporting to reserve said premises for public use of plaintiff, and plaintiff is estopped to deny the validity of the same.

(e) That the area of the premises conveyed to Plaintiff by Bissell ét als, January 4, 1853 was with-

in the boundaries of the survey referred to in said conveyance, to which premises these defendants make no claim, but did not include Island No. 1, or any part thereof, or any part of the areas embraced in State Surveys Nos. 34 and 569, and the line depicted on Ex. "N" (hereto attached and made a part of this answer) as the line of the upland [88] in 1852, was and is the Northern boundary of Mare Island and the Southern boundary of said premises No. 34; that the Northern line of Mare Island, as there depicted, is the Machine Shop depicted on said maps.

XIX.

That Ex. "N" is a copy of the Freeman Survey made for the purposes depicted on its face; that the same is referred to and made a part of this answer to show only the stations marked thereon; that Ex. "M" is a copy of the decision of the U. S. Surveyor General for California relating to the same, and which is referred to and made a part of this answer; that a line drawn from Station 54 to Station 138 constitutes the northern boundary of Mare Island and the southern boundary of the lands embodied in said Survey No. 34, and also constitutes the southern boundary of Island No. 1, and coincides with the parallel intersecting the northern highland of Mare Island as established by the joint actions of the United States and California, culminating in the Act of Cession by California and accepted by the United States May 11, 1854.

XX.

That the plaintiff by its attorney, A. L. Rhodes, appeared in the suit of Bouldin vs. Phelps (30 Fed. 547) in this Court and participated in the trial thereof, and contended that the said Castro grant was void in law and in fact was a forgery, and these defendants claiming under the United States, under its said grant to California, allege the plaintiff is estopped to contend otherwise in this suit.

XXI.

That in the said application of California for certification, Curtis D. Wilbur, Secretary of the Navy, appeared within his authority to so appear, attended by his counsel, the Attorney General of the United States, and disclaimed and abandoned the [89] said executive orders, and these defendants allege that the plaintiff is concluded thereby from asserting now said executive orders, or any claim other than that of its alleged purchase of Mare Island.

XXII.

That the Act of Congress in providing for the acquisition of a Navy Yard at Mare Island made and constituted Caleb Cushing, Attorney General of the United States, a special tribunal to determine whether the swamp and overflowed portions of Mare Island or the swamp and overflowed lands abutting said Mare Island had passed to California under the Swamp and Overflowed land grant of September 28, 1850, and in the exercise of such jurisdiction, he determined that such swamp and overflowed lands

had passed to California, and thereon the plaintiff applied to California for a cession of the overflowed portion of Mare Island, and on May 11, 1854, California granted such application to the extent of ceding to the plaintiff the swamp and overflowed lands on the easterly side of Mare Island south of a parallel intersecting the northern highland of Mare Island at said Machine Shop, and excluding thereby the swamp and overflowed lands north of said parallel running from east to west and from ships channel in Napa River to San Pablo Bay, restricting the cession to the lands so described therein, which said cession with its conditions was accepted by the plaintiff, and these defendants allege plaintiff is estopped to claim otherwise.

XXIII.

That in the mandamus proceeding referred to in the patent of the United States and in plaintiff's Bill of Complaint, (plaintiff's Bill Par. 12) it was determined finally that the premises in controversy, embraced in said State Survey No. 34, were a part of the public domain of the United States on September 28, 1850. [90]

XXIV.

That the supervising authority of the Secretary of the Interior on such matters authorized him to issue such instructions and to take such steps in the exercise of his judgment and discretion as he deemed proper for the ascertaining of the fact whether the lands claimed by California on its said application

for certification, including the premises embraced in said State Survey No. 34, were swamp and overflowed lands on September 28, 1850, and in the exercise of such judgment and discretion he took the steps for such purposes as are detailed in paragraph 12 of this answer, and in which matter the patent by the United States issued to California, and which inured to these defendants, as their interests appear, and in such connection, these answering defendants allege that they deem it unnecessary to plead concerning the legal result of the said peremptory mandamus directing the Secretary of the Interior in the first instance to determine the quality of the land, or in the second instance of directing him to certify said lands to California.

XXV.

Further plaintiff alleges that the decisions and records in the suits of San Francisco Savings Union vs. Irwin (28 Fed. 578) and Bouldin vs. Phelps (30 Fed. 547) are muniments of the title of these defendants and their co-tenants in common, and these defendants plead them for such purpose and for the further purpose of informing the court of the public facts established in each of said suits which these defendants allege are binding and conclusive on the plaintiff herein.

XXVI.

These defendants further plead the Act of Congress approved August 31, 1852, C 109, 10 Stat. 100, 104 Sec. 3, to establish the fact that the Secretary

of the Navy was authorized to seek a cession from California to plaintiff of the lands and juris- [91] diction over the lands described in the Cession Act of May 11, 1854, (or to make or to abandon reservations for public use), and in connection therewith allege that the cession so obtained by the said Secretary of the Navy is binding on plaintiff and that plaintiff is estopped from claiming title to any other swamp and overflowed lands in either of said townships, and these defendants refer to said Cession Act, including the application for such cession, and make the same a part of this answer.

XXVII.

The defendants further plead that the Act of July 23, 1866, an Act to quiet titles to land in California, and a further grant in praesenti of all swamp and overflowed land in California to the State and confirmatory of the Act of September 28, 1850, and further and in such connection with the same, these defendants allege that no part of the premises here was on such date occupied by the plaintiff and/or was devoted to public use and being unreclaimed and not drained, was unfit for any public use and up to the 24th day of July, 1866 the plaintiff had made no improvements or expenditures thereon; that any alleged occupation of said premises was not open, notorious or visible to the human eye; that taxes were levied on said lands and the possessing rights therein by the State of California and paid by the owners thereof, to the State; that Exhibits "A" and

"B" hereto attached, depict all improvements made under the said Act of Congress up to their respective dates of issue (U. S. vs. Romaine 255 Fed. 253) and these defendants allege it is the duty of this court to take judicial cognizance of the facts depicted on the respective exhibits.

XXVIII.

That said Exhibit "A" depicts the topography of Island No. 1, showing the hundreds of tidal streams cutting into it north, south, east and west, including the Salt Marsh lying [92] between it and Mare Island, some 2000 feet in width, which markings are conclusive and binding on the plaintiff.

XXIX.

Reiterating all the foregoing allegations and for a further defense, these defendants allege as follows:

(a) That any portion of Mare Island that was swamp and overflowed on September 28, 1850 was subject to said grant of that date.

(b) That Mare Island lying in the Napa River at its mouth and bounded on three sides by navigable streams, passed to the ownership of California on her admission into the Union of States, and was not subject to reservation for public uses of the United States; that the State of California never consented to the purchase or reservation of any portion of Mare Island except the portion thereof described in said cession Act and limited the same by said cession act to a possessing right for the period that said

Mare Island was occupied by the United States as a Navy Yard and said condition subsequent was accepted by the United States; that Mare Island was not, and is not accessable from any of its sides owing to the S. & O. lands and the tide lands lying between it and navigable waters.

XXX.

That Ex. "Sketch J-2" (Ex. "P") hereto attached and referred to and made a part of this answer, was made and prepared by the United States Coast Survey pursuant to law in the manner and for the purposes depicted on its face and at the time stated on its face, and the northern boundary of Mare Island and the southern boundary of the Swamp and overflowed lands later established by segregation Survey No. 34, and by said examinations made by the Secretary of the Interior, and later by the descriptions inserted in the federal patent to California are depicted thereon and ad interem by other surveys by said Coast and Geolog- [93] ical surveys, and was adopted by the Board of Officers sent to California to select a site for a Navy Yard and is the boundary survey of said area referred to in the said Bissell et als conveyances to the United States, and a copy of which is hereto attached, marked Ex. O and is hereby referred to and made a part of this answer; that the plat of Township 4, N. R. 4 W. etc. Ex. F approved March 9, 1904 was made under directions by the Secretary of the Interior to compile the same from maps on file in the Interior Department and from said State

segregations of S. & O. lands in Napa and Sonoma Counties (the latter now Solano County) the same being State Surveys No. 34 and 569 in accordance with the second clause of R. S. Sec. 2488, and also in accordance with the directions contained in Interior Department letter "E" dated February 2, 1904, which was approved and adopted by said Secretary; that the lands marked in red lines on said township plats is a portion of Island No. 1 and Survey 569, later marked on said plat by the Surveyor and approved by the Secretary of the Interior on the application of California for said certification as above alleged in paragraph 12 of this answer.

That Ex. K hereby referred to and made a part of this answer is the survey of the Board of Officers sent to California to select a site for a Navy Yard and is the survey referred to and made a part of the conveyance of Mare Island, etc. by said Bissell et als., and said survey depicts the natural boundaries of said Island and all of the tract of land so attempted to be conveyed by said grantors; that the land depicted therein as lying on the easterly side of Mare Island is the lands embraced in said Cession Act; that by the terms of sub. (6) of Sec. 2077 of the Code of Civil Procedure of California, said survey is the controlling description of the conveyance and said survey follows the waters edge and the natural boundaries of Mare Island [94] and embraces the entire area of Mare Island and all the lands, in any event, that was granted to said Victor Castro and by him conveyed to alleged predecessors, in title, of

the United States; that the Navy Yard plan attached to said exhibit also shows the area of said Mare Island and depicts the Machine Shop, since erected, and located at Station 138 depicted in Freeman Survey (Ex. N) and pointed out in the decision of the U. S. Surveyor General Wagner (Ex. M) and is the southerly line of said State Survey No. 34, and the same excludes the areas in said State Surveys Nos. 34 and 569.

Reiterating all the foregoing matter and allegations, these defendants allege that said Patent of the United States to California approved the said State Surveys Nos. 34 and 569, and said State Patent to said Darlington and thereby established in California a taxing right, together with police power and the right to exercise eminent domain for the uses of the State, and the State is a necessary and indispensable party defendant in this suit; that on issuance of said federal patent the fee simple title of the United States vested in California as of the date of September 28, 1850, and all subsequent adverse action on part of plaintiff since that date, either by purchase as alleged in the Bill of Complaint herein or by attempted reservation for public uses, was null and void and said federal patent is not subject to collateral attack by the plaintiff in a suit to quiet title under the laws of California, or otherwise, or in an action to cancel its own duly executed surveys or the approved surveys of the state or its own instruments executed in connection with the subject matter of this suit, or its swamp and overflowed reclamation contract, the terms of

which have been fully performed by California and its grantees, all of which was to the knowledge of plaintiff at the time of said performance and at the time of the filing of this suit, and in accordance [95] with its policy to secure the reclamation of said lands by and through the state and its grantees, and all of which was approved by the United States on March 9, 1928.

That all the foregoing allegations and said exhibits are by way of answer and as a cross bill against the United States.

That the Act of September 28, 1850, was not a public land law of the United States, but a contract between the United States and California for the reclamation and/or drainage by the State, and/or its grantees, of all S. & O. lands within the State of California, and is not subject to the Public Land Surveys of the United States in the execution of the same, but subject only to the provisions of said act of July 23, 1866 (R. S. 2488); that no provision of the public land laws, or of the public land surveys of the United States are applicable to the same; that said Sec. R. S. 2488 relates only to S. & O. lands within California.

That the individual interests of said defendants in said premises as tenants in common and entitled to the possession of the same are: James E. O'Donnell 30/100; Walter E. Burke, as trustee, etc. 27/100; Edmund Burke 3/100; and Fletcher M. Slosson, Frances Morse and Eleanor Caroline Whitman 40/100.

WHEREFORE, these defendants pray:

1. That the bill of complaint be dismissed.

2. That the title of these defendants be quieted as against plaintiff, and that these defendants have such other [96] and further decree as may be equitable.

EDMUND BURKE
Pro Se.

WALTER E. BURKE as trustee
Pro Se.

JAS. E. KELBY, (KELBY AND LAWSON),
Attys. for James E. O'Donnell, Fletcher M. Slosson, Frances Morse and Eleanor Caroline Whitman.

State of California,
City and County of San Francisco.

Edmund Burke, being duly sworn, deposes and says, he is one of the defendants above named; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters stated to be alleged on information and belief, and as to these matters he believes it to be true.

EDMUND BURKE

Subscribed and sworn to before me this 31st day of March, 1931.

[Seal] O. A. EGGERS
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Mar. 31, 1931. [97]

[Title of Court and Cause.]

MOTION TO DISMISS BILL OF COMPLAINT AS AMENDED.

To the Attorneys for the Plaintiff:

Comes now the defendant Edmund Burke and moves that the Bill of Complaint as amended, be dismissed and a decree be entered in favor of this defendant as prayed for in his amended answer.

EDMUND BURKE
pro se
705 Signal Oil Company Bldg.,
Los Angeles, California.

The said motion will be made on the following grounds:

1. That said Bill of complaint as amended does not state facts sufficient to constitute a cause of action against said defendants, or either of them.

2. That said bill as amended does not state facts cognizable in Equity.

3. That plaintiff has not legal capacity to maintain its suit being without legal or equitable title.

On said motion and in support of said motion, this defendant will use the files herein and the points and authorities in the printed brief in United States vs. Stewart et al heretofore filed in said suit and a copy of which was heretofore filed in said suit and served on attorneys for plaintiff.

Said motion will be brought on for hearing before the Hon. A. F. St. Sure, a judge of this court in the division thereof in which he may be sitting on the 4th day of May 1931, at ten o'clock A. M.,

Post Office Building, San Francisco, California.

EDMUND BURKE

pro se [98]

[Endorsed]: Rec'd. copy this 24th of April, 1931.

GEO. J. HATFIELD

by E. B. CARRIER

Attys. for complainant.

Filed Apr. 24, 1931. [99]

[Title of Court and Cause.]

ANSWER TO BILL OF COMPLAINT AS AMENDED.

The undersigned attorneys for the respective parties stipulate as follows:

1. That the name of the defendant Frances Morse be changed to "Frank Clifford Morse",

2. That on line 23, page 3 of said answer the word "are" be inserted between the words "confirmations" and "included".

3. That on line 31, page 3, the figures "1823" be changed to "1923".

4. That on line 13, page 5, the figures "3/100" be stricken out.

5. That on line 9, page 8, the word "that" be stricken out and the word "allege" inserted.

6. That on line 28, page 8, the word "this" be stricken out and the word "its" inserted.

7. That on line 20, page 11 the word "exclusing" be stricken out and the word "excluding" inserted.

8. That on line 25, page 14, the word "court" be stricken out and the word "coast" inserted.

9. That on line 26, page 15, the word "National" be stricken out and the word "natural" inserted.

EDMUND BURKE,
pro se
WALTER E. BURKE,
as trustee, etc., pro se [100]
KELBY and LAWSON,
Attys. for James E. O'Donnell, Fletcher M. Slosson, Eleanor Caroline Whitman and Frank Clifford Morse.
GEO. J. HATFIELD,
by I. M. P.
Attorneys for the United States of America.

It is so ordered.

A. F. ST. SURE,
Judge of the U. S. District Court.

[Endorsed]: Filed Apr. 30, 1931. [101]

[Title of Court and Cause.]

ANSWER OF FRANK R. DEVLIN TO BILL OF COMPLAINT.

Comes now Frank R. Devlin, sued herein as First Doe, Defendant, and answering Bill of Complaint herein, admits, denies and alleges as follows:

Admits that he claims an interest in the lands described in said Bill of Complaint, but alleges and asserts that his said claimed interests in said lands were acquired from and through and are subordinate to, the interests of Fletcher M. Slosson, Dorothy Slosson, his wife, Frank Clifford Morse, Frances Morse, his wife, Eleanor Caroline Whitman, formerly Eleanor Caroline French, and Alfred Whitman, her husband, in and to said lands, and this [102] defendant hereby consents, agrees and stipulates that any judgment which may be rendered herein adverse to interests of his said co-defendants in this paragraph named, shall affect and bind him to the same extent as such judgment may affect or bind his said co-defendants or determine the interests of his said co-defendants in said premises.

That this defendant disclaims any interest in said lands and premises, except as the same exist under the conditions and circumstances set forth herein.

Dated, July 1st, 1931.

FRANK R. DEVLIN,
Pro Per.

[Endorsed]: Service of the within by copy is hereby admitted this 3rd day of July A. D. 1931.

GEO. HATFIELD,
U. S. Atty.
Attorney for Plff.
By E. B. CARRIER,
Special Asst. U. S. Atty.

Filed Jul. 3, 1931. [103]

[Title of Court and Cause.]

ORDER REVIVING SUIT.

Upon the motion of Geo. J. Hatfield, United States Attorney for the Northern District of California, Attorney for complainant and on the order to show cause heretofore made thereupon by the above entitled court in the above entitled suit, and no sufficient cause appearing or being shown why this order should not be made,

IT IS HEREBY ORDERED that the above entitled suit be and the same is revived and continued against each and all of the following defendants to the above entitled suit: James E. O'Donnell, Juanita O'Donnell, his wife, Fletcher M. Slosson, Dorothy Slosson, his wife, Frank Clifford Morse, Frances Morse, his wife, Eleanor Caroline Whitman, formerly Eleanor Caroline French, Alfred Whitman, her husband, Walter E. Burke, as Trustee for Villa M. Behan, Villa M. Behan, formerly Villa M. Burke,

S. J. Simons, V. M. Price, E. J. Sullivan, First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, Eighth Doe, Ninth Doe, and Tenth Doe, also all other persons unknown claiming any right, title, estate, lien or interest in the real property described in this complaint adverse to complainant's title thereto, and especially against Walter E. Burke, administrator of said Edmund Burke, Deceased, defendant.

Done in open Court this 15th day of February, 1932.

A. F. ST. SURE,
United States District Judge

[Endorsed]: Filed Feb. 15, 1932. [104]

[Title of Court and Cause.]

STIPULATION.

IT IS HEREBY STIPULATED, that the answer of Edmund Burke on file in this action shall be, and is, the answer of Walter E. Burke, the administrator of the Estate of Edmund Burke, deceased.

Dated: March 4, 1932.

GEO. J. HATFIELD
By. I.M.P.
United States Attorney
WALTER E. BURKE
Solicitor for Administrator.

[Endorsed]: Filed Mar. 4, 1932. [105]

[Title of Court and Cause.]

AMENDMENT TO BILL OF COMPLAINT.

Leave of the Court first had and obtained, plaintiff above named, by Geo. J. Hatfield, Esq., United States Attorney, its attorney and solicitor, files this Amendment to the Bill of Complaint to add thereto a paragraph numbered IV (a).

IV (a).

In July, 1877, the Surveyor General of California, in compliance with the Thirteenth Section of the Act entitled "An Act to ascertain and settle the private land claims in the State of California," approved March 3, 1851, caused said private land claim for Mare Island to be surveyed and a plat to be made thereof, and thereafter gave notice that the same [106] had been done by publication once a week for four consecutive weeks in two newspapers, one published in the City of San Francisco, to-wit, the Alta California, and one published near the land surveyed, to-wit, the Vallejo Evening Chronicle, published in the City of Vallejo, County of Solano, State of California, and retained in his office, for public inspection, the survey and plat until ninety days from the date of the first publication in San Francisco expired; that no objections were made to said survey, and the said Surveyor General of California approved the same and transmitted a copy of the survey and plat thereof to the Commissioner of the General Land Office at Washington, for his examination and approval; thereafter the Commissioner of the General Land Office

approved said survey and plat and caused the same to be filed in a jacket, called the Mare Island Jacket, in the file of military reservations in the General Land Office; thereafter on September 22, 1905 the Commissioner of the General Land Office expressly approved, used and acted on the said survey and plat, and thereafter on September 28, 1905 the Secretary of the Interior expressly approved and concurred in said action of the Commissioner of the General Land Office, and approved, used and acted on the said survey and plat.

WHEREFORE, plaintiff prays that the said paragraph numbered IV (a) be deemed added to Plaintiff's Bill of Complaint as an amendment thereto.

(Sgd) GEO. J. HATFIELD
United States Attorney,
Attorney and Solicitor for Plaintiff.

[Endorsed]: Filed May 3, 1932. [107]

[Title of Court and Cause.]

MOTION OF DEFENDANTS TO EXCLUDE.
MOTION NO. I.

Defendants move the Court to exclude from the evidence plaintiff's "Exhibit E", for the reasons:

(1) That it is incompetent;

(2) That the claim of Castro was never confirmed but that if it was confirmed, it was of Mare Island to the water's edge;

(3) That the conveyance is void insofar as it attempts to convey lands in excess of those confirmed;

(4) That, on September 28, 1850, the alleged grant to Castro was a mere claim, unrecorded, where by law it was required to be recorded;

(5) That it was not sub judici until August 30, 1852;

(6) That the description in the conveyance by Bissell, et al., to the United States, is controlled by reference to the Sloat Survey, which is not attached to the instrument or offered in evidence, or accounted for;

(7) That the conveyance is inoperative in and of itself;

(8) That the claim of Castro remains inchoate and incomplete for that no official survey of the premises has been made to establish the boundaries of the grant, and no patent has isued to the confirmees thereon;

(9) That regarding the grant as validly confirmed, the title of confirmees is only an equitable one and that of plaintiff's is not more, and the conveyance did not vest plaintiff with anything more than the equitable title (and this objection goes to the right [108] of plaintiff, which holds the equitable title to maintain this action); (10) That the Castro grant was found and declared fraudulent and void in the case of Bouldin vs. Phelps, 30 Fed. 547; (11) That the conveyance to plaintiff does not in any event embrace the premises in the controversy; (12) That the title to premises embraced in Survey

No. 34 vested in the State of California by virtue of the Swamp Land Act of September 28, 1850; (13) That the finding and determination of Attorney General Caleb Cushing appointed a special tribunal for that purpose by Act of Congress, that the Swamp and Overflowed portions of Mare Island were excluded from the conveyance of that Island and that such swamp and overflowed portions belonged to California, under the Swamp Land Grant Act, and that, acting upon that decision, plaintiff applied to California for and obtained a cession of swamp and overflowed lands within the exterior boundaries of Mare Island, by reason whereof plaintiff is estopped to claim swamp and overflowed lands within and without the boundaries of Mare Island; (14) That plaintiff is estopped to deny its own patent to California for the land embraced in said survey No. 34, and to impeach the survey upon which it is based; (15) That plaintiff is disabled to impeach the judgment or decree in the Mandamus Case.

MOTION NO. II.

Defendants move to exclude the whole and each and every part of plaintiff's "Exhibit C", composed of

(a) Copy of Transcript of proceedings before Land Commission; (b) Copy of expediente and translation of same used by Land Commission; (c) Order of Reference; (d) Informe and Return of the Justice of the Peace; (e) Certified Copy by the Secretary of the Land Commission of the Grant

of Juan B. Alvarado to Castro, of Mare Island; (f) Decree of Confirmation and opinion of confirmation by Land Commission; (g) Entire record in appeal from Decree of Land Commission in No. 311, on grounds as follows:

(1) Incompetency; (2) Alleged grant was antedated; (3) the [109] alleged grant was spurious and forged; (4) The alleged grant was void on its face for that it failed to show the approval thereof by the Departmental Assembly of California; (5) That it was not registered, as required by the laws and regulations of Mexico, applicable thereto; (6) That the alleged grant was not exemplified, as required by Mexican laws and regulations (7) That it was not subscribed, as required by the laws and regulations of Mexico; (8) That it was beyond the power of Governor Alvarado to make the alleged grant; (9) that no title ever passed to Victor Castro under said alleged grant; (10) That the Land Commission was without jurisdiction to pass upon or decree confirmation; (11) That the alleged decree of confirmation was and is void for lack of jurisdiction; (12) That neither the alleged grant nor a certified copy thereof was ever produced to or filed with said Land Commission or with the District Court of the United States, and the latter was without jurisdiction for the same reasons that the Land Commission was without jurisdiction; (13) That the pretended nunc pro tunc order made by said Court on April 15, 1930, was and is void for the reason stated, and on the further ground that said order was made

and given after the date of the reissuance of the patent of the United States to the State of California, dated March 9, 1928, and which inured to the benefit of these defendants, and was given without notice to or knowledge of defendants; (14) That since the 4th day of January, 1853, Aspinwall and Bissell, grantors of the United States, were no longer interested in the premises; (15) that, in any event, the alleged Castro grant was not sub judici on September 28, 1850, and any valid Mexican Grant on that date fell before the Swamp Land Act of that date, and, so far as the lands embraced in Survey No. 34 were concerned, were excluded, and said acts and proceedings are incompetent and constitute an attempt to attack collaterally the patent of the United States and the survey upon which it is based and to which it responds; and, further, it is an attempted collateral attack on the final judgment or decree [110] in the Mandamus Case, on the final judgment or decree in Bouldin vs. Phelps, 30 Fed. 547, and on the final judgment in San Francisco Savings Union vs. Irwin, 28 Fed. 708, by all and each of which the plaintiff is bound.

MOTION NO. 3.

Defendants move to exclude plaintiff's "Exhibit D" from the evidence, which "Exhibit D" purports to be a certified copy of the Castro Grant, as recorded in the Office of the County Recorder of Sonoma County, California, in Book "H" of Deeds, at page 169, the record of which is in the Spanish language, on the ground that it is incompetent,

the law not then or now permitting the recordation of an instrument in any language other than the English language, and on the further ground that the alleged grant was void for all the reasons stated in Motion No. 2, hereof.

Wieber vs. Corbie, 13 Cal. 166.

MOTION NO. 4.

Defendants move to exclude plaintiff's "Exhibit F", being the report of the Smith Board, on the ground that it is incompetent, irrelevant and immaterial.

MOTION NO. 5.

Defendants move to exclude plaintiff's "Exhibit H", which is a purported copy of a letter from Secretary of the Navy, Kennedy, dated February 12, 1853, on the ground that it is incompetent, irrelevant and immaterial and not tending to support any issue made by the bill and answer; and, on the further ground that the Secretary of the Navy and the President of the United States were without authority to reserve lands, the title to which, under the Swamp Land Act, had passed to the State of California, under the terms of the Act of September 28, 1850.

MOTION NO. 6.

Defendants move to exclude the following exhibits offered by plaintiff, and each of the following exhibits, viz.: [111]

Plaintiff's	Exhibit	L-1,	Plaintiff's	Exhibit	L-13-A,
"	"	L-2,	"	"	L-15,
"	"	L-3,	"	"	L-16,
"	"	L-4,	"	"	L-17,
"	"	L-5,	"	"	L-18,
"	"	L-6,	"	"	L-19,
"	"	2-6-A,	"	"	L-20,
"	"	L-7,	"	"	L-21,
"	"	L-A,	"	"	L-22,
"	"	L-8-A,	"	"	L-23,
"	"	L-8-B,	"	"	L-24,
"	"	L-9,	"	"	L-25,
"	"	L-10,	"	"	L-26,
"	"	L-11,	"	"	L-27,
"	"	L-12,	"	"	L-28,
"	"	L-13,	"	"	L-29,

on the ground that they are severally incompetent, irrelevant and immaterial, are not, nor is either of them the result of or founded on any survey; that no proper foundation has been laid for their introduction or as to their accuracy, and that neither of them was made by the authority of the United States; there is nothing to show that they, or either of them, were ever adopted or followed by the United States or that they and/or any of them are official; and on the further ground that the only purpose of offering said exhibits is to impeach the description contained in the conveyance from Bissell, et al., to the United States, which description is controlled and determined by the Sloat Survey, being the survey referred to in said Deed of Conveyance; and on the

further ground that the introduction of said exhibits, respectively constitutes an attempt to impeach the patent from the United States to the State of California, inuring to the benefit of defendants; to impeach the decree or judgment in Bouldin vs. Phelps, in San Francisco Savings Union vs. Irwin, and in the Mandamus Case.

MOTION NO. 7.

Defendants move the Court to exclude and strike from the record the following questions and the answers thereto:

Q. I call your attention to the words "Mare Island and Highland of the Island", and ask you what is the significance of that name and the Highland of Mare Island?

A. The name follows local custom. [112]

Q. I direct your attention to the words "Island No. 1 at the North End of Mare Island", and ask you what that indicates?

A. It indicates the local name but does not attempt to define the limits to which that name is to be applied.

Q. Now can you state whether or not this name of "Island No. 1" appeared on any previous map of the Coast and Geodetic Survey?

A. I have examined the records of our Chart Instructions and find that in 1913 a note by the man who made the drawing for the chart of that date, in which he stated that amendments were made in this area, particularly dykes and roads from geo-

graphical survey, quadrangle, and in explanation of the use of those charts, he says that we had only one survey, the Coast Geodetic Survey had only one survey in this area and the geological survey had a recent one made. Among the factors which he applied were roads and dykes and the name of the newly reclaimed area.

Q. Is this the first appearance of that name in any map of the Coast Geodetic Survey?

A. It appeared in a chart which was prepared in 1903.

Q. This is a reprint of the Chart of 1903?

A. This is a reprint of the Chart of 1903.

Q. In the placing of that name, "Island No. 1", on the chart, was that placed there for delimitation purpose or identification purpose?

A. As a name which was applied locally and put on the chart merely for identification.

Q. What became of the name "Island No. 1" to the north end of Mare Island?

A. It was removed from our chart of 1922 on receipt of better information. The name "Island No. 1" had never appeared or "Island No. 2" has never appeared on any of our surveys.

Q. If it did not appear on the survey, will you state what basis, if any, the map maker had to put it on the map?

A. The only thing I can say is the surveyor made an attempt to use [113] local names and from some authority obtained these designations, which he put on the map;

on the ground that it is incompetent, self-serving, hearsay, a conclusion, and not a statement of facts, and not the best evidence.

MOTION NO. 8

Defendants move to exclude and strike from the evidence the following questions and answers:

Q. I want to ask the witness if that was a part of the map in the government archives? Was that made by a map maker?

A. No, I do not believe it was.

Q. Is it any part of the duty of the map maker to make a notation of that kind on the map?

A. Frequently, or once in a while after the plat is approved, there are notations placed on the original plat of the survey.

Q. Directing your attention to the pencil lines on the map, I will ask you if that is a part of the official plat approved by Mr. Beale, of that office, at that time?

A. I do not believe so because it is not customary to put pencil lines on a plat that is for a permanent record, I mean the original plat;

on the ground that the questions and the answers thereto are incompetent, hearsay, self-serving, and calling for the conclusion of the witness.

MOTION NO. 9.

Defendants move to exclude and strike out plaintiff's "Exhibit H", being a copy of a purported letter from the Secretary of the Navy, dated February 9, 1853, requesting the reservation of Mare Island,

and President Fillmore's notation thereon, reserving Mare Island, on the ground that it is incompetent and immaterial, and on the further ground that it was not within the power of the Secretary of the Navy or of President Fillmore to reserve Mare Island, as claimed by the plaintiff in this case, on the ground that [114] Mare Island, or that part of it claimed by the plaintiff, as extending northerly from the upland or fastland of Mare Island proper had been previously granted to the State of California by the Swamp Land Act of September 28, 1850.

MOTION NO. 10.

Defendants move the Court to exclude and strike out from the evidence plaintiff's "Exhibit M", on the ground that it is incompetent and the mere expression of an opinion rendered twenty (20) years after the Sloat Report and Survey was made; that it is hearsay, self-serving, and not binding on the defendants, and is not in correspondence with but is in contradiction of the Sloat Survey and Report.

MOTION NO. 11.

Defendants move the Court to exclude and strike out from the evidence plaintiff's "Exhibit N", on the ground that it is incompetent, irrelevant and immaterial, and does not purport to be official or that it was ever adopted by the United States.

MOTION NO. 12.

Defendants move the Court to exclude and strike from the evidence plaintiff's "Exhibit P", together with the excerpt therefrom, on the ground that it is

incompetent, hearsay, self-serving, the expression, at most, of a mere opinion, and not binding on the defendants.

MOTION NO. 13.

The defendants move to exclude and strike out from the evidence excerpts from the letter of Commissioner Tallman, of the General Land Office, dated September 16, 1914, on the ground that it is incompetent and immaterial, hearsay, self-serving, the expression of an opinion, which opinion was afterwards abandoned by the General Land Office, and on the further ground that it is an attempt to impeach the patent of the United States to the State of California, the surveys on which it is based and the decree or judgment in the [115] Mandamus Case, and the decree or judgment in the case of Bouldin vs. Phelps, and in the case of San Francisco Savings Union vs. Irwin.

MOTION NO. 14.

Defendants move the Court to exclude from the evidence plaintiff's "Exhibit T", being the report of one W. J. Lightfoot, on the ground that it is incompetent, hearsay, self-serving, and in flat contradiction of the Sloat Report and Survey, and an attempt to vary the description contained in the conveyance from Bissell, et al., to the United States.

Respectfully submitted,

JAMES E. KELBY and
GORDON LAWSON,
Solicitors for Defendants.

Dated: May 3-4-5, 1932.

[Endorsed]: Received copy of the within Motions to Exclude this 13 day of May, 1932.

GEO. J. HATFIELD,
Attorney for Complainant.

Filed May 13, 1932. [116]

[Title of Court and Cause.]

MOTION TO DISMISS BILL UNDER RESERVED OBJECTIONS.

Defendants move to dismiss the Bill herein upon grounds and for reasons as follows:

I.

The alleged grant to Castro is void on its face because it purports to grant an interdicted island.

II.

The Bill in connection with the void grant fails to state facts cognizable in equity or sufficient to constitute a cause of action against defendants, or any, or either of them, for that:

(a) The Bill fails to allege that the alleged Grant to Castro was, at the time of its issuance, or at any time, or at all, registered as required by the then existing Mexican law;

(b) The Bill fails to allege that the Castro Grant was approved by the Assembly of the Department of California;

(c) The Bill fails to allege that the claim of

Victor Castro to the ownership of Mare Island was sub judici on September 28, 1850;

(d) The Bill fails to allege that, subsequent to the decrees of confirmation therein referred to, the premises affected thereby were surveyed and/or patented to the alleged confirmees, the alleged successors in interest to Castro;

(e) It appears affirmatively on the face of the Bill that said Claim of Castro, or his successors in interest, to the ownership of Mare Island, did not become sub judici until August 31, 1852, [117] when the petition for confirmation was filed with the United States Land Commission;

(f) The Bill does not allege why Castro, or his successors did not assert claim of private ownership until August 31, 1852, when the petition for confirmation was filed, or that they were in possession of the premises prior to that date.

III.

That the decree of confirmation by the United States Land Commission is void on its face because it purports to confirm a grant void on its face, that is, a grant of an interior island in the Bay of San Francisco.

IV.

That the nunc pro tunc decree of confirmation is void on its face for reason stated in III above.

V.

That the decree of confirmation by the United

States Land Commission became functus officio, since the appeal therefrom was a proceeding de novo.

VI.

That the pretended nunc pro tunc decree is void, for the further reason that it affirmatively appears from the Bill that, prior to its entry, the premises had been patented to the State of California, and, by operation of law, had inured to defendants, as successors in interest to said State.

VII.

That the executive orders, and each executive order, was void and of no effect because issued after September 28, 1850—the date of the approval of the Swamp and Overflowed Land Grant Act.

The second executive order was void for the additional reason that it attempted to reserve for public use "appendages of tule and marsh ordinarily reported to belong to Mare Island". [118]

VIII.

That the conveyance by Bissell, et al., to the United States, of Mare Island, "including tule, lowland or marsh belonging to Mare Island, or ever claimed to belong to Mare Island", is void for the following reasons:

(a) Because it affirmatively appears from the Bill that its base was the void Castro Grant, the void decree of confirmation of the United States Land Commission, and the void nunc pro tunc decree of the District Court;

(b) Because it attempts to convey lands and interests in lands which the grantors in said conveyance did not acquire through said confirmations respectively, and which were in excess of and excluded from the grant as confirmed, of which the grantee was charged with notice;

(c) Because it attempts to convey, by vague and indefinite words, lands other than and outside of and beyond Mare Island, that is, "tule, lowland and marsh belonging to Mare Island, or are claimed to belong to Mare Island", and which are not embraced in said Castro Grant or in said pretended decree of confirmation, but which are included in the S. and O. Land Grant of California, approved September 28, 1850, and embraced in the patent to California, dated March 9, 1928, which patent, by operation of law, has inured to defendants' successors in interest of said patentee;

(d) Because neither the said void grant itself nor any decree pretending to confirm it extended to or embraced lands other than an island in the Bay of San Francisco, California, known as Mare Island, and, being an island, was, and is, bounded by the water's edge.

(e) That said conveyance, which is pleaded as a part of the Bill by reference, makes the survey of Mare Island by the Board of officers sent to California to select a site for a Navy Yard a part of the Bill; which survey was by the Secretary of the Navy, pursuant to an Act of Congress, approved August 31, 1852, by the mandatory di- [119] rection of which said Secretary was directed to acquire a

site for a Navy Yard in the Bay of San Francisco; which survey (area report) excludes the premises in controversy from Mare Island;

(f) Because it appears affirmatively from the Bill, and as a matter of law, that the patent of the United States to California became by relation as of date, September 28, 1850, and hence is superior to the alleged Castro Grant and to any subsequent pretended confirmation thereof, and to any claim of purchase or order of reservation made or issued subsequent to that date;

(g) Because it affirmatively appears that the Castro Grant or the premises embraced thereby were not reserved by the Treaty of Hidalgo Guadalupe, or by the treaty relating to the "Gladsen Purchase", or by any law of the United States prior to March 3, 1851;

(h) That even if the premises in controversy were embraced in the so-called Castro Grant or in the subsequent confirmations, any obligation of the United States to protect the same was only political in character, the United States having the lawful right to disregard the treaty by the passage of the S. and O. Land Grant of September 28, 1850; and if the effect of that act was to violate the treaty, still it is the mandatory duty of this Court to follow the act and to ignore the treaty.

IX.

That it appears affirmatively from said Bill that the United States claims possession under color of

title, amounting to title by prescription. If the position of the United States is thus accurately stated, does it not follow, as of course, that this suit is based alone on a prescriptive title, through adverse possession. In this view of the case, the Castro Grant, decrees of confirmation, executive orders, and even the deed to the United States, are severally immaterial. But as to the United States, adverse possession [120] with or without color of title will never ripen into a title by prescription until the legal title, (which, in the instant case, it held until March 8, 1928), has gone from it and for a period of five years after that date.

X.

That adverse possession cannot be maintained here since the United States held the legal title to the premises in controversy until the 8th day of March, 1928, when the patent was issued.

XI.

If, as is the case here, the premises in controversy passed to California by force of the S. and O. Land Grant of September 28, 1850,—a matter indubitably determined by the Secretary of the Interior—any title acquired thereto by purchase by the United States inured to California and its grantees, and the United States is estopped from asserting the same against said State or its grantees.

XII.

That the S. and O. Land Grant Act was a contract

between the nation and the State of California, and the United States is estopped to dispute its validity.

XIII.

The United States is estopped to assert the invalidity of its S. and O. Land Grant to California, in order to support the claim of private ownership in a third person, which claim of ownership was subsequently acquired by the United States in hostility to its own grant.

XIV.

That it appears affirmatively from the Bill that the equitable title of the State of California, evidenced by the patent of the State to David N. Darlington, was confirmed by the statutory proceedings instituted by that State and in which the premises known as "34" were identified as those of S. and O. on September 28, 1850, and should be certified as such. [121]

XV.

That the equitable title of the State of California, having been confirmed and perfected by statutory proceedings under Sec. 2488 R. S., it is immaterial whether a patent issued, or, if one issued, whether it is irregular in a matter of description, the Bill not disputing the accuracy or legality of any part of the identification and segratory proceedings; if there was any defect in the survey, the defect was cured by the issuance of the patent to California.

XVI.

Because it appears affirmatively from the Bill that the legal title of the United States has passed to the grantees of the State, defendants herein, this suit is not maintainable since it is the settled law of California that a suit to quiet title cannot be maintained by a plaintiff without the legal title, and it further appears from the Bill that the United States is without legal or equitable title.

XVII.

This suit is essentially one to quiet title, plaintiff claiming under a conveyance to it from Bissell, et al., dated January 4, 1853, and defendants under a patent of the United States, dated March 9, 1928. It results, therefore, that the title of plaintiff at most is only an equitable one while that of defendants is the legal one. This being the case, the plaintiff cannot sue to quiet title against defendants and its only remedy is to compel conveyance of the legal title. Plaintiff does not seek to compel a conveyance of the legal title. On the contrary, its claim is that the patent is void, and it asks this Court to decree it. There is a marked difference between an action to compel a conveyance of the legal title and one in which it is sought to have the legal title declared void and the equitable title transformed into a legal title. [122] In the one case the legal title is recognized, and in the other denied. Clearly, therefore, this suit is a collateral attack not only on the patent of the United States, but also on the patent of the

State of California. Also, it is a collateral attack on the judgment in the Mandamus Case.

XVIII.

Because it appears affirmatively from the Bill that the purported Grant to Castro was of an island, known as "Mare Island", and, being an island, was bounded by the water's edge, and was confirmed to that extent; and anything in excess of that was beyond the power of Castro's successors to grant or convey.

XIX.

That this suit is not one to impeach a patent of the United States on the ground of imposition practiced on an official of the United States, but is one in which the United States seeks to quiet its title as against the defendants on the grounds, (1) that on September 28, 1850, the premises in controversy were held in private ownership by one Castro; (2) that subsequently to September 28, 1850, the premises were reserved for public use; (3) that the description in the United States patent to California is void because the depiction of a subdivisional survey of the premises "(34)" was not made in any plat or any public land survey of the United States, and that plaintiff's "Exhibit J" was the only public land survey and plat of the premises known as "34". This, in face of the fact, that it is not alleged that the survey and plat required by Sec. 2488 R. S. had not been made and approved or that it was inaccurate or insufficient in any detail, and there being

in the Bill no allegation of fraud, imposition or mistake.

XX.

The Bill pleads and sets up the United States patent to California. The patent is made a part of the Bill and the patent itself makes the Mandamus proceedings in the Supreme Court of the District of Columbia a part of the patent, and hence the patent and, equally [123] the Mandamus proceedings, become a part of the Bill. And in and by said Mandamus proceedings it affirmatively appears that it was therein finally determined that the premises, "34", were, (1) a part of the public domain on September 28, 1850; (2) that the Secretary of the Interior, in the exercise of his exclusive jurisdiction, had determined that the premises were swamp and overflowed on September 28, 1850, as contemplated by the S. and O. Act of that date, and, of necessity, that the premises should be certified to California; and hence the averment in the Bill that the lands were unsurveyed and that the description in the patent is void for that reason is a prohibited collateral attack on the final and executive determination of the Secretary of the Interior, which perfected the equitable title of the State, passing to it under the Act of September 28, 1850, and also a like attack on a final judgment of a Court of competent jurisdiction relating to the same subject matter. The judgment went against the Chief Land Officer of the United States and the judgment is binding and conclusive upon the plaintiff. The writ could

not have issued in that case unless the evidence showed or tended to show the existence of the matters and things stated and, among others, that the lands in question had been surveyed and the survey finally approved. See 23 F. (2nd) 137 and 5-6 Page 138-9. The Trial Court found that the Secretary of the Interior found that the lands in question were swamp lands at the date of the Grant, and that such a finding presumes approval of the survey since such approval was a condition precedent to a determination as to the character of the land. To restate, a finding by the Land Office as to quality conclusively presumes a previously approved final survey. And the statement in the patent to the effect that the lands described therein are those unsurveyed, is an idle gesture, as well as a registration of disappointment and, mayhap, a covert attack on the judgment itself, from which the government took no appeal.

Further, and as separate grounds therefor, defendants move the Court to dismiss the Bill and on the further following grounds:

1. That the Bill is multifarious to the extent of being rendered unintelligible, the Bill alleging:

(a) Title thru purchase;

(b) Title thru executive reservations;

(c) Title thru adverse possession under color of title;

making it apparent that each of these allegations is repugnant and hostile to the other.

Plaintiff may only rely upon purchase, if that ground be available to it, and rest his entire case

upon that ground and abandon each of the other grounds.

XXI.

The Bill alleges substantially that the body of land represented by California Survey No. 34 was, on a date in 1841, severed from the public domain of Mexico by virtue of a grant by Mexico to one Castro, and that it never became a part of the public domain of the United States or subject to its control or disposition.

If this is so, the presidential reservations were void and of no effect and constituted an invasion of the rights of Castro and his successors; and if the grant was thus effected, there would be no adverse possession, since the possession was the sale possession of Castro and his grantees, of whom the United States is the final grantee, and the latter could not adverse itself. Moreover, the United States is disabled from setting up adverse possession since, until the issuance of the patent to California, on March 8, 1928, it held the legal title to the land.

2. The Bill presents prohibited collateral attacks, to-wit: as previously in this Motion particularized.

3. That the United States, in this suit, stands in the shoes of its predecessors in interest and can maintain no suit alleging the inability of the United States Patent to California, for the reason that their claim to the premises in controversy continues in-[125] choate, the alleged decrees of confirmation not having been followed by the approved survey and

patent to confirmees, as required by the Act of July 1, 1864 (Stat. 13, Page 332), which statute was in existence on said date and controlled, and controlls the rights of the parties.

JAMES E. KELBY and
GORDON LAWSON,
Solicitors for Defendants.

Dated: May 5, 1932.

[Endorsed]: Received copy of the within Motion to dismiss this 13 day of May, 1932.

GEO. J. HATFIELD,
Attorney for Complainant.

Filed May 13, 1932. [126]

[Title of Court and Cause.]

MOTION TO STRIKE.

Defendants now move the Court to strike from the Bill of Complaint the following matters and each of the following matters, that is to say:

I.

To strike from said Bill of Complaint, "Exhibit C," attached thereto and made a part thereof, on the ground that said exhibit in and of itself fails to describe the land thereby attempted to be conveyed, but refers for a description of such land to a source aliunde the exhibit, as appears from the following language contained in said exhibit, to-wit:

"All that tract of land and island called and known as Mare Island, in the Bay of San Pablo, as recently surveyed by the Board of Officers of the United States sent to California for the selection of a site for a Navy Yard there * * *"

and on the further ground that the said survey referred to, and the map, chart, and field notes thereof are not attached to said exhibit or to said Bill, or proffered, produced, or filed herein, and on the further ground that said "Exhibit C" is meaningless and without value, without said mentioned survey, map, or chart and field notes, for delimiting the land purported to be conveyed.

Sub. 6, Sec. 2077, C. C. P.

II.

To strike from the Bill of Complaint the following, commenc- [127] ing on line 19, and ending in line 24, Page 7, to-wit:

"That ever since September 16, 1853, the United States has occupied the land described in Paragraph II of this Bill, by and thru its Navy Department and Officials, and has used, and improved the same for military purposes in connection with the Naval Station, Navy Yard, and premises of complainant situated thereon."

on the ground that it is immaterial, it not being alleged that the complainant or its grantors or predecessors in the chain of title were in possession of said premises prior to September 28, 1850.

III.

To strike from said Bill of Complaint the following language, commencing in Line 10 and ending in Line 20, Page 11, reading:

> "and for the further reason that said alleged patent was not issued pursuant to the judgment, discretion, or determination of said Hubert Work, as Secretary of the Interior or of the Commissioner of the General Land Office, or upon or pursuant to any finding or conclusion or judgment of said officers, or either of them, or of the President of the United States, which said officials are, by law, charged with the duty and responsibility of caring for, protecting, disposing of and awarding patent for or other evidence of title to the public domain and any part thereof;"

on the ground that it is redundant and immaterial, and on the further ground that it is an attempt to impeach and therefore collaterally attack and also to have reviewed, the final judgment or decree rendered by the Supreme Court of the District of Columbia, in the case of the United States of America, ex rel. James E. O'Donnell, relator, against Hubert Work, Secretary of the Interior, respondent, from which judgment or decree respondent afterwards appealed to the Court of Appeals, District of Columbia, where it was affirmed; and which said judgment of affirmance has never been appealed from, reversed, or modified, and is in full force and effect and binding upon the complainant herein.

IV.

To strike from the Bill of Complaint, the following, to-wit: commencing in Line 20 on Page 11 and ending in Line 8 on Page 12, reading: [128]

"and for the further reason that the descriptions in said alleged patent are null and void and designate no tracts or parcels of land shown, or delimited on any approved and accepted United States Public Land Survey Map or Plat;

That the only final, recognized, approved, and accepted United States Public Land Survey, map or plat of that portion of Mare Island contained within fractional Township 3 North, Range 4 West, M. D. B. & M. and showing tracts and parcels of land therein and controlling all description of land and lots and tracts therein for disposal, and other governmental purpose, is the map and township plat approved and accepted in 1923, a true reproduction of which is hereto attached and marked 'Exhibit J,' and referred to and made a part of this Bill of Complaint.

That upon said map and plat are shown no subdivisions, tracts or parcels of land, such as are mentioned in said purported patent of 1928, to the State of California, and no survey '(34)' and no lots, tracts, or subdivisions corresponding to said subdivisional descriptions contained in the purported patent."

on the ground that it is redundant and immaterial; on the further ground that it is an attempt to col-

laterally attack and to have reviewed the final payment in the "Mandamus Case," by stipulation a part of the record here; which judgment is binding upon complainant; and on the further ground that it does not allege that the survey and plat required by Sec. 2488 of the Revised Statutes had not been made and approved, or that the description contained in the patent is inaccurate or insufficient in any detail.

V.

To strike from the Bill of Complaint the map or plat marked "Exhibit J," referred to in and attached to and made a part of said Bill of Complaint, on the ground that the survey referred to in it and which, under subdivision 6 of Section 2077 of the Code of Civil Procedure of California, controls the description, is not attached to the Exhibit, or proffered or produced or filed. In making this motion, movants reserve to themselves the privilege of using said plat, "Exhibit J," should they deem it proper.

VI.

To strike from the Bill of Complaint the language commencing in line 8 and ending in Line 13, of Page 3, reading: [129]

> "A copy of which said grant is hereto annexed, marked 'Exhibit A,' and made a part of this Bill of Complaint. Said instrument was filed for record in the Office of the County Recorder of and for Sonoma County, California, on July 28, 1852, said Mare Island

being then within and a part of said Sonoma County,"

on the ground that the alleged grant, conclusively presumed to be in the Spanish language, and alleged to have been recorded in Sonoma County on July 28, 1852, was not, and could not have been lawfully recorded in that County or elsewhere in the State of California, there not having been, on said date, nor is there now, any lawful authority for the recordation of any instrument or document in any language other than the English language; and on the further ground that "Exhibit A," of the alleged Castro Grant into English, and is neither the original grant nor a certified copy of it; it being the settled law of California, that a Spanish or Mexican Grant in the Spanish language can only be established by the production of the original or a certified copy. Wilson vs. Cohen, 13 Cal. 166, Bixby vs. Bent, 51 Cal., 390.

VII.

To strike from the Bill of Complaint the language commencing in Line 4 and ending in Line 10, Page 3, reading:

"That, by an instrument dated May 20, 1841, executed by one Juan B. Alvarado, Constitutional Governor of the Department of California, a Grant was duly made by the Government of Mexico to one Victor Castro, of Mare Island, which then included and now embraces the land above described; a copy of which said

grant is hereto annexed, marked 'Exhibit A,' and made a part of this Bill of Complaint."

on the ground that the alleged grant was unsupported by any antecedent Mexican Record or Registry of the Grant; that the antecedent record was the vital evidence of the grant, the grant itself; that said grant could not be presumed; that the antecedent record was the equivalent of actual seizin; that a grant without such antecedent record was no grant, and, further, that there was no approval or evidence of approval of the alleged grant by the Departmental [130] Assembly, a vital necessity under the then existing Mexican Law; and on the further ground that the Governor of California, on May 2, 1841, was powerless to grant an interior island bounded by navigable waters.

JAMES E. KELBY and
GORDON LAWSON,
Solicitors for Defendant.

Dated: May 5, 1932.

[Endorsed]: Received copy of the within Motion to Strike this 13 day of May, 1932.

GEO. J. HATFIELD,
Attorney for Complainant.

Filed May 13, 1932. [131]

[Title of Court and Cause.]

ORDER.

ORDERED:

1. That the motion of defendants to exclude certain testimony offered by plaintiff filed May 13, 1932, be and the same is hereby denied.

2. That the motion to strike certain parts of the bill, filed May 13, 1932, be and the same is hereby denied.

3. That the motion to dismiss the bill under reserved exceptions, filed May 13, 1932, be and the same is hereby denied.

4. That plaintiff have decree as prayed for in its bill.

Dated: July 31, 1933.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Jul. 31, 1933. [132]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled action having come on duly and regularly for trial on the Bill of Complaint of the plaintiff as amended, and the answers of the appearing defendants, as hereinafter stated, the plaintiff appearing by Geo. J. Hatfield, United States Attorney, and I. M. Peckham, Assistant United States

Attorney, and Edmund Burke having appeared and answered said Bill of Complaint in his own person and thereafter died, and thereafter the court having duly and regularly made its order reviving this suit against the defendants, including Walter E. Burke, administrator of the estate of Edmund Burke; and defendant Walter E. Burke as trustee for Villa M. Behan, formerly Villa M. Burke, having answered in his own person; and defendant Villa M. Behan, formerly Villa M. Burke, having appeared and disclaimed any right, title or interest except that arising through her said trustee, [133] defendant Walter E. Burke; and defendants James E. O'Donnell and Juanita E. O'Donnell, described herein as Juanita O'Donnell, having answered by their attorneys Messrs. Kelby and Lawson; and defendants Fletcher M. Slosson and Dorothy Slosson, his wife, Frank Clifford Morse and Frances Morse, his wife, Eleanor Caroline Whitman, formerly Eleanor Caroline French, and Alfred Whitman, her husband, having appeared and answered by Messrs. Athearn, Chandler and Farmer and Frank R. Devlin, their attorneys, for whom said last named attorneys said defendants substituted Messrs. Kelby and Lawson as their attorneys; and defendant Frank R. Devlin having appeared in his own person and consented to be bound by any judgment herein made against the last named defendants through whom said defendant claims; and it being stipulated that the answer of Edmund Burke be deemed the answer of Walter E. Burke as administrator of the estate of

Edmund Burke, deceased; and the defendants S. J. Simons, V. M. Price, E. J. Sullivan, not being found or served, this cause is as to them dismissed; and it appearing that defendants James E. O'Donnell, Fletcher M. Slosson, Frank Clifford Morse, Eleanor Caroline Whitman, Edmund Burke (Walter E. Burke administrator), Walter E. Burke as trustee, answered the Bill of Complaint as amended, but that defendants Juanita E. O'Donnell, Dorothy Slosson, Frances Morse and Alfred Whitman did not answer said complaint as amended, the trial proceeded as upon the original answers of said defendants and the case came on duly and regularly for trial on the 5th day of August, 1931, and was thereafter duly and regularly continued until the 5th day of May, 1932, and evidence both oral and documentary having been introduced and the court having fully considered the same, the court now finds:

I.

That the places of residence of the known defendants are as alleged in paragraph I of the Bill of Complaint.

II.

That complainant, United States of America, is the owner of, and since the year 1853 has occupied as part of the [134] Mare Island Navy Yard Reservation for public, to-wit: Military and Naval purposes, and has been in possession of, the following described land, which is situated in the County of

Solano, State of California and in the Northern Division of the Northern District of California, to-wit:

> "All that parcel and body of land known and designated as tract No. 38, containing 1473.95 acres, more or less, shown upon the approved and accepted United States public survey map of 1923 covering fractional Township 3 North, Range 4 West, M. D. B. and M., California, together with all accretions, natural or artificial, to said lands or any part thereof, which tract and body of land includes, as the defendants claim, within its northerly portion, a strip or lot of ground reported to have been surveyed in the year 1856 on behalf, and under the authority of the State of California and purportedly returned and described as State Swamp and Overflow Land Survey No. 34 containing 164.55 acres and designated as a fractional portion of the south one-half of the south-east quarter of section 10, the northeast fractional portion of the northeast quarter of section 15, the southwest fractional portion of the northwest quarter of section 14, and the northeast fractional portion of the southwest quarter of section 14 in said township 3 north, range 4 west, M. D. B. and M."

That said last mentioned land, together with all accretions, natural or artificial, appertaining thereto or to any part thereof, is the specific land and area involved in this suit; that said last mentioned pur-

ported subdivisional descriptions designated as State Swamp and Overflow Survey No. 34 are null and void and that no such tracts or parcels or pieces of land exist or are delineated or shown upon any approved and accepted United States public land survey, map or plat.

III.

That by an instrument dated May 20, 1841, executed by Juan B. Alvarado, Constitutional Governor of the Department of California, a grant was duly made by the Government of Mexico to one Victor Castro of Mare Island which then included and now embraces the land above described; a copy of which said grant is annexed to plaintiff's complaint, Marked Exhibit "A", and re- [135] ferred to and incorporated therein; that said instrument was filed for record in the office of the County Recorder of and for Sonoma County, California, on July 28, 1852, said Mare Island then being within and a part of said Sonoma County; and George W. P. Bissell and William H. Aspinwall, having succeeded by mesne conveyances to the rights and title of said Victor Castro under said grant, filed in the office of the Board of Land Commissioners, which said Board was empowered to ascertain and settle land claims in the State of California, their petition seeking the confirmation to them of their title to the lands included in said grant to Victor Castro as set out herein, and such proceedings were thereupon had before said Board of Land Commissioners, including the taking of evidence, that a decree was

duly given, made and entered by said Board, confirming to said petitioners, their right and title in and to the lands included in said grant, said decree of confirmation being in the words and figures following:

"No. 307. George W. Bissell, et al. v. United States. In this case, on hearing the proofs and allegations, it is adjudged by the Commission that the claim of said petitioners herein is valid, and it is therefore decreed that their application for a confirmation thereof be allowed.

"The place of the confirmation as hereby given is situate in the Bay of San Francisco and is called 'Isla De La Yegua' or 'Mare Island' and being an island is bounded by the water's edge.

R. Aug Thompson
S. B. Farwell, Commissioner.
George Fisher, Sec'y.

Filed in office May 8, 1855".

IV.

That the said Board of Land Commissioners was vested with power and authority to make such confirmation by the act of Congress approved March 3, 1851, (9 Stats. 631), and pursuant to the terms of Section 8 of which Act, said petitioners, Bissell and Aspinwall, claiming said Mare Island in California under right and title derived from the Mexican Government, did present the same to the said Board of Land Commissioners, together with evidence in

support of said claim and said Board did pass upon the [136] evidence so produced in behalf of the United States, and did determine and uphold the validity of such claim, and within thirty days after such decision did certify the same with the reasons therefor, to the District Attorney of the United States for the District of California, in which such decision was rendered.

That pursuant to the terms of sections 9 and 10 of said Act, the United States, by its District Attorney duly presented its petition to the United States District Court for the District of California, in the District in which said land was situated, praying for a review of said decision and decree of said Board of Land Commissioners, and for a decision on the validity of said claim, and duly complied with the law and requirements governing such petition for review. And the said George W. P. Bissell and William H. Aspinwall filed their Answer thereto, and thereafter such proceedings were had in said matter that on March 2, 1857, the said District Court of the United States for the District of California duly gave and made its order for judgment in said cause, confirming the said grant and the said decision of the said Board of Land Commissioners, and thereafter on April 15, 1930, the District Court of the United States for the Northern District of California, the successor to said Court, duly gave and made its judgment and decree confirming said decision and decree of said Board of Land Commissioners and directing the entry of said decree nunc

pro tunc as of the 2nd day of March, 1857, a copy of which decree is attached to the Bill of Complaint, marked Exhibit "B" and referred to and incorporated therein. Defendants are remote claimants under, successors to, and in privity with, the United States of America, plaintiff and appellant in said appeal from the decision of said Board of Land Commissioners, against which plaintiff and appellant said judgment and decree was entered with respect to sovereign and paramount title then and there asserted and claimed by the said claimant and appellant, and defendants are bound by said claim and decree. [137]

IV(a)

In July, 1877, the Surveyor General of California in compliance with the 13th section of the Act entitled "An Act to ascertain and settle the private land claims in the State of California", approved March 3, 1851, caused said private land claim for Mare Island to be surveyed and a plat to be made thereof, and thereafter gave due notice that same had been done by publication once a week for four consecutive weeks in two newspapers, one published in the City of San Francisco, to wit, "The Alta California" and one published near the Land Surveyor, "The Vallejo Evening Chronicle", published in the City of Vallejo, County of Solano, State of California, and retained in his office for public inspection the survey and plat until ninety days from the date of the first publication in San Francisco expired; that no objections were made to

said survey and the said Surveyor General of California duly approved the same and transmitted a copy of the survey and plat thereof to the Commissioner of the General Land Office at Washington, for his examination and approval. Thereafter the Commissioner of the General Land Office duly approved said survey and plat and caused the same to be filed in a jacket called "The Mare Island Jacket" in the file of military reservations in the General Land Office; thereafter on September 22, 1905, the Commissioner of the General Land Office expressly approved, used and acted on said survey and plat and thereafter, on September 28, 1905, the Secretary of the Interior expressly approved and concurred in said action of the Commissioner of the General Land Office, and approved, used and acted on said survey and plat.

V.

That the United States of America acquired the title and interest of George W. P. Bissell and William H. Aspinwall in and to the land so conveyed and confirmed to them, and also the title and interest of Mary S. MacArthur in said land as a tenant [138] in common of the said Bissell and the said Aspinwall, by purchase for a valuable consideration, namely: $83,491.00, and received a deed of conveyance of said property executed January 4, 1853, a copy of which is annexed to plaintiff's complaint and marked Exhibit "C", and referred to and incorporated therein; and the said deed was duly filed for record and recorded in the Recorder's

Office of Solano County, California, on April 18, 1853, said Solano County being the County in which said lands were situated.

VI.

That on November 6, 1850, the President of the United States by Executive Order reserved to the United States for military and naval purposes from entry by private persons, among others, the following tract of land on San Francisco Bay, to wit:

Mare Island.

VII.

On February 9, 1853, the Secretary of the Navy of the United States of America, acting under and in pursuance of section 3 of the Act of August 31, 1852, (10 Stats. 104), duly selected the tract of land in the Bay of San Francisco bounded by the Bay of San Pablo, the Straits of Carquinez, and Napa Creek, known as Mare Island, together with all its appendages of tule or marsh land ordinarily reported to belong to said island, and the harbors, waters and anchorages connected therewith, and necessary to the use of the same and within which is included the lands and premises described in paragraph II of the Bill of Complaint herein, as a site for a Navy Yard and Naval Depot provided for by said Act of Congress.

Following said selection the Secretary of the Navy on February 9, 1853, recommended to the President of the United States that said lands and premises be reserved for public use, and on February 11, 1853,

President Millard Fillmore duly approved [139] said recommendation and made said reservation and said reservation was communicated to the Secretary of the Interior and properly recorded.

A copy of the aforementioned selection of said tract and recommendation of the Secretary of the Navy, together with the approval of the President of the United States and his order making such reservation is attached to the Bill of Complaint marked Exhibit "D" and referred to and incorporated therein.

From time to time Congress of the United States of America duly approved, ratified and confirmed said reservation and by various statutes appropriated large sums to improve the lands comprised therein and authorized their improvement.

VIII.

The lands and premises described in paragraph II of Bill of Complaint are included within the boundaries and are a part of the lands and premises described and conveyed by said grant of Juan B. Alvarado, Governor of California, under the rule and occupancy of Mexico, to Victor Castro, confirmation of which grant was made by the Board of Land Commissioners and by the United States District Court as aforesaid, to George W. P. Bissell and William H. Aspinwall, and are included within the boundaries of and are a part of the lands and premises purchased by the United States from said Bissell and Aspinwall and their co-grantor Mary S. McArthur, as hereinbefore alleged.

That ever since September 16, 1853, the United States has occupied the lands described in paragraph II of the Bill of Complaint by and through its Navy Department and officials, and has used and improved the same for military purposes in connection with the Naval Station, Navy Yard and premises of complainant situated thereon.

The possession of the United States of America thereof has at all times been actual, open, adverse and exclusive [140] and under claim of right and absolute ownership in fee of said land, and under the title and color and claim of title supplied by said reservations and the said ded of January 4, 1853, the said decision of the said Board of Land Commissioners of May 8, 1853, the said order of the said District Court of the United States for the District of California duly given and made March 2, 1857, and said decree of April 15, 1930. The lands described as claimed by the defendants in paragraph II of plaintiff's Bill, during such period of occupancy of the complainant, have been improved for military and naval purposes by the construction of buildings and improvements thereon. Said buildings and improvements are now actively and continuously used by the complainant for naval and military purposes and have been so used since the construction and making thereof and there is now located on the northerly portion of said land described in paragraph II of plaintiff's Bill of Complaint, a Marine Corps Rifle Range, a Submarine Repair Base, an Aviation Landing Field, a

causeway to the Navy Yard, an overseas freight shipment transit shed, Navy Yard scrap bins and storage, an electrified classification yard for railroad, storage corrals, moorings for destroyers, and many other buildings, structures and utilities, all of which were and are of a value exceeding $1,250,000.00 and were and are used by the complainant for the operation and activities of its naval and military force.

IX.

The lands in question described in paragraph II of plaintiff's Bill of Complaint were claimed by the State of California under and by virtue of the Act of September 28, 1850, (9 Stats. 519), commonly known as the "Swamp Land Act," by which the whole of those Swamp and Overflowed Lands, made thereby unfit for cultivation, comprising part of the public domain of the United States of America on the date of the passage and approval of said Act, and remaining unsold, were granted to the State. Said lands were purportedly surveyed in the year 1856 under authority of the State of California, and identified by such survey as [141] Survey No. 34 and as containing 164.55 acres in area, and thereafter the State of California issued its patent purporting to convey said lands included in said survey to David M. Darlington, under date of March 18, 1857, a copy of which patent is annexed to plaintiff's Bill of Complaint and marked Exhibit "E", and referred to and incorporated therein.

X.

Defendants herein named, and each of them, claim title or some right, title or interest, in and to the lands described in said purported Survey No. 34 and in paragraph II of the plaintiff's Bill of Complaint, through and by virtue of Mesne conveyances vesting in them the purported title of the said David M. Darlington, or some part or parcel thereof. Defendants and each of them claim some right, title or interest in said real property adversely to the right and title of plaintiff, but each of said claims is wholly without right or foundation in law or fact; that there are other persons to complainant unknown claiming some right, title, estate, lien or interest in the real property described in paragraph II of plaintiff's Bill of Complaint adverse to the complainant's ownership, which claims cast a cloud upon the complainant's title therein; that the claims of said persons are wholly without right or merit in law or in fact.

The nature of defendants' claims appears by their said answers but said claims are wholly without right.

XI.

On March 9, 1928, a purported patent was issued to the State of California, which alleged patent is in effect an attempted conveyance of the lands, secondly and lastly mentioned and described in paragraph II of plaintiff's Bill of Complaint, a copy of which said purported patent is annexed to plaintiff's Complaint and marked Exhibit "F" and referred

to and incorporated therein. That said purported patent was issued under and pursuant to an order dated March 8, 1928, by the then Secretary of the Interior, directing that a patent issue to the State of California in accordance with a preemptory Writ of Mandamus [142] issued on March 6, 1928, out of the Supreme Court in the District of Columbia in an action at law therein, namely No. 70,226, entitled, "The United States of America, ex rel James E. O'Donnell, relator, vs. Hubert Work, Secretary of the Interior, Respondent," a copy of which said order is attached to plaintiff's Complaint and marked Exhibit "G" and is referred to and made a part of plaintiff's Bill of Complaint, and a copy of which said writ is attached to plaintiff's Complaint and marked Exhibit "H" and referred to and made a part of said Bill of Complaint. Thereafter the Secretary of the Interior made and filed his return to said Writ of Preemptory Mandamus, a copy of which return is annexed to plaintiff's Complaint and marked Exhibit "I" and is referred to and incorporated therein. But the said alleged patent to the State of California is null and void and is without force and effect and has no validity for the reason that the lands described in said purported patent were claimed and held in private ownership from the Governor of Mexico at the time of the passage and approval of the above mentioned Swamp Land Act, and were not a part and never had been a part of the public domain of the United States or been opened for entry by private persons, or subject to the aforesaid Swamp Land grant, but

have at all times since the date of said Mexican grant to Victor Castro been owned and occupied by complainant as proprietor and by those under whom the complainant claims its proprietary ownership thereof; and for the further reason that the said land had been selected for and devoted to the necessary public purposes of the United States and withdrawn from entry by private persons as alleged in paragraphs VI and VII of plaintiff's Bill of Complaint, long prior to the issuance of the said purported patent to the State of California, and while the legal title in and to said lands was vested in the United States of America; and for the further reason that said alleged patent was not issued pursuant to the judgment, discretion, determination or power of said Hubert Work, as Secretary of the Interior, or of the Commissioner of the General Land Office, [143] or upon or pursuant to any finding or conclusion or judgment of said officers or either of them or of the President of the United States, which officials are by law charged with the responsibility of caring for, protecting, disposing of and awarding patents for, or other evidences of title to, the public domain and any part thereof; and for the further reason that the descriptions of said alleged patent are null and void and designate no tracts or parcels of land shown or delineated on any approved and accepted map or plat.

That the only final, recognized, approved and accepted United States public land survey, map or plat of that portion of Mare Island contained within fractional township 3 North, Range 4 West,

M. D. B. and M., and showing tracts and parcels of land therein and controlling all desrriptions of land and lots and tracts therein for disposal and other governmental purposes, is the map and township plat approved and accepted in 1923, a true reproduction of which is attached to plaintiff's Bill of Complaint and marked Exhibit "J" and referred to and incorporated therein.

Upon said map and plat are shown no subdivisions, tracts or parcels of land such as are mentioned in said purported patent of 1928 to the State of California, and no survey No. 34 and no lots, tracts or subdivisions corresponding to said subdivisional descriptions are contained in the purported patent.

XII.

That the true name of defendant sued herein as First Doe is Frank R. Devlin, who has appeared and answered; that the true names of defendants as Second to Tenth Doe inclusive, and the interest claimed by them respectively to the lands described in paragraph II of complainant's Bill of Complaint are unknown to plaintiff and to the court and said defendants Second to Tenth Doe, inclusive, are hereby dismissed.

XIII.

Complainant is without adequate remedy in the premises at law. [144]

XIV.

It is not true that defendants or any of them are owners of, or entitled to the possession as tenants in

common, or otherwise as alleged in the joint answer of defendants to the Complaint as Amended, or any part of the tract described in paragraph II of plaintiff's Complaint or in California State Swamp and Overflow Survey No. 34.

XV.

It is not true that the grant of Mare Island by Juan B. Alvarado to Victor Castro dated May 20, 1841, is void on its face or at all because it purports to grant an interdicted island or otherwise, or that the said grant was or is a forgery, or that plaintiff knew it was such when plaintiff's Bill of Complaint was filed.

It is not true that said decree of confirmation by the United States Land Commission is void on its face.

XVI.

It is not true that the proceeding to confirm the said grant of Mare Island to said Castro and his mesne successors had terminated on June 4, 1853, by their conveyance of said premises to plaintiff or plaintiff's acceptance of the same, and it is true that the said granted premises included Mare Island to the water's edge, but it is not true that it did not include any portion of the premises sought to be described, delineated and depicted in State Segregation Surveys Nos. 34 or 569, or either of them, or any land north of a line drawn from Station 54 to Station 138 as depicted in Freeman's survey of 1877.

It is not true that the appeal of the United States from said decree of confirmation was, or that any of the proceedings thereafter had therein were null and void on its or their face, or otherwise.

It is not true that the nunc pro tunc decree of confirmation entered in this court therein is null and void on its face or otherwise. [145]

XVII.

It is not true that the conveyance of Bissell, Aspinwall and McArthur to the United States, dated June 4, 1853, is null or void on its face or otherwise.

XVIII.

It is not true that the order of the President, dated November 6, 1850, reserving Mare Island for public use is null or void on its face or otherwise.

XIX.

It is not true that the order of the President, dated February 9, 1853, reserving Mare Island with all its appendages of tule or marsh ordinarily reported to belong to Mare Island is null or void on its face or otherwise.

XX.

It is not true that the premises described in paragraph II of plaintiff's Complaint are a part of any Island No. 1 embraced in said Surveys Nos. 34 or 569 as depicted on the official maps of plaintiff, copies of which, marked respectively "A" and "B" are attached to the joint answer of defendants filed March 31, 1931, and therein referred to and incor-

porated, or as reported or depicted in any approved survey and plat of Township 4 North, Range 4 West, M. D. B. & M., accepted November 8, 1923, were on September 28, 1850, or at any time or at all, or ever, a part of the public domain of the United States, or swamp and overflowed lands embraced in Swamp and Overflowed Land Grant to California at that date.

It is not true that said premises or any part thereof were not within the exterior boundaries of Mare Island or were north of the northern boundary of Mare Island as established officially by United States Surveyor General Wagner, or anyone, within his jurisdiction to so establish; that Exhibit "M" attached to and made a part of said answer of March 31, 1931, was neither a decision, nor within the jurisdiction, of United States Surveyor General Wagner; that Surveyor General Wagner had no power to alter or modify said survey of Freeman. [146]

XXI.

It is not true that the improvements made by plaintiff on the premises in controversy were made as a trespassal upon said premises or were without claim or right or color of title, although the same were made without and against the consent and adversely to the claims of defendants and their predecessors in title; that it is not true that plaintiff is without right or equity in the premises or is proceeding or ever did proceed as a trespasser or by force of arms.

XXII.

It is not true that statements in the patent to the State of California that the lands therein described were unsurveyed at the date of the issue said patent is untrue, or was and is an error of law which is refuted by any record on which said patent is based.

XXIII.

It is not true that defendants have any interest in the premises sued for as tenants in common with others as the record discloses or otherwise, or that as such co-tenants they are entitled to the possession of said premises under any mesne conveyance from the State of California as successors of plaintiff, or otherwise, extending to defendants under the Swamp and Overflowed Land Grant to California of September 28, 1850, or under any other grant.

XXIV.

It is not true that the patent of the United States, with its recitals or descriptions, or otherwise, issued to California, March 9, 1928, determined the land was part of the public domain on September 28, 1850, or was not included in the grant to Castro.

It is not true that the lands described in State Surveys Nos. 34 and 569 were included in Swamp Land Grant of September 28, 1850.

It is true that about September 16, 1914, California applied to the Commissioner of the General Land Office for certi- [147] fication to it of lands falsely claimed by it to be indefinitely represented as swamp and overflowed on certain plats approved

March 4, 1863, pursuant to R. S. Sec. 2488; that lines on said plats claimed to refer to the lands in controversy were not surveyed lines but were merely drawn in. But the application was correctly rejected by the Commissioner of the General Land Office on the ground that the plats did not define the extent of any body of land "notoriously and obviously swamp and overflowed", as specified in R. S. Sec. 2488, or "furnish information indicating that any particular part, great or less, of the lands claimed were wet and unfit for cultivation." That thereafter, about February 15, 1915, the said Commissioner, pursuant to R. S. 2488, paragraph 5, and particularly pursuant to a Writ of Mandamus of the District of Columbia Supreme Court, approved instructions for the examination and investigation by the United States Surveyor General for California of the lands on Mare Island claimed by California as swamp and overflowed lands, and to identify the location and character of the lands embraced in State Swamp and Overflow Surveys Nos. 34 and 569, which lands were claimed by California as swamp and overflowed lands under said application.

It is true that thereafter and pursuant to said instructions said examination was made by the United States Surveyor General and that later he reported to the Secretary of the Interior that said lands embraced in said State surveys were in physical character "swampy and overflowed", and thereupon the Secretary of the Interior determined that said lands were swamp and overflowed and should

be certified to the State of California under its application in the absence of sufficient reasons to the contrary. That said premises No. 34 were in said order recited to be "contiguous" to Mare Island though not recited to be apart from it, and the said action of said Secretary was declared by the District of Columbia Supreme Court to be an approval of the [148] plat of Township 4 North, Range 4 West, and thereafter, pursuant to further Writ of Mandate of the District of Columbia Supreme Court the land embraced in said State surveys were listed and patented to the State of California.

XXV.

It is true that Exhibit "A" attached to defendants' Answer is a Coast Survey Chart, and Exhibit "B" attached to said Answer a Geological Survey Chart, and Exhibit "H" attached to said Answer an alleged township plat of 4 North, Range 4 West, M. D. B. & M., and that each of said Exhibits labels the northern or fan portion of Mare Island as "Island No. 1", but do not depict them as separate tracts of land or separate islands but all within a continuous mean high water line including both "Island No. 1" so called, and the lands here in controversy, State Swamp and Overflowed Survey No. 34 so called; and that "Island No. 1" as set forth on said charts is a local place name of recent application; and that the lands in controversy here would fall partly on "Island No. 1" as designated on said charts; that each of said charts depicts Island No. 1 and Mare Island as separate tracts of firm land,

though not as separate islands; that said plats, maps and surveys are official acts of plaintiff, duly authorized by law, and said Exhibit "H" was approved by the Secretary of the Interior. It is also true that it was no part of the duties or powers of the persons making said maps to impose local place names on said maps in such manner to prejudice the rights of the United States.

XXVI.

It is not true that the imposing on Exhibit "E" annexed to defendants' Answer of the delimitation of the premises purported to have been reserved for public use by the said presidential orders by the Secretary of the Interior was a null or void act or that either of said orders was void on its face or without legal effect, though said act of the Secretary of the Interior could not limit the rights of the United States to lands outside [149] the area so delimited. It is not true that at the time of the making of said orders the equitable title to the premises in controversy had passed under any grant in praesenti or otherwise to the State of California under Swamp and Overflowed Land Grant of September 28, 1850, or any other grant, nor was said grant a contract between the United States and California which inured to the answering defendants and/or their co-defendants as their interest might appear, nor was the President of the United States without authority in law to make either of said executive orders.

It is not true that Exhibit "A" annexed to plaintiff's Bill of Complaint is not a copy of the grant to Castro, nor was said purported grant a forgery.

XXVII.

It is not true that said alleged grant was never finally confirmed to said Victor Castro or to his successors in interest. It is not true that the area or boundaries of said tract of land has never been determined or ascertained by survey thereof by the United States Surveyor General for California. It was surveyed by Freeman and the Freeman Survey was approved. It is true no patent thereof has issued to the confirmee or confirmees pursuant to the Act of Congress of July 1, 1864, or otherwise, but the court finds such patent unnecessary, as simply a confirmation by the United States to the United States, the transferee of the confirmees.

XXVIII.

It is not true that by reason of said decision by the Secretary of the Interior identifying, or attempting to identify, the premises sued for, or any other premises, as swamp, the said patent of David M. Darlington was confirmed as of the date of its issue pursuant to the provisions of the Act of July 23, 1866, or any Act, or that said confirmation has inured to any of the appearing defendants. [150]

It is not true that by reason of the purchase of said premises by the United States subsequent to September 28, 1850, any title or interest acquired by the United States thereby has inured to any of the defendants or their co-tenants in common or

otherwise, or that plaintiff is estopped to assert the same against the defendants or any of them, or that the same was or is subordinate in any particular to State-Swamp and Overflowed Grant of September 28, 1850, or to any Federal patent to California therefor.

XXIX.

It is not true that said claim of Victor Castro was not reserved by the Treaty of Guadalupe Hidalgo, or by statute of the United States on September 28, 1850. It is not true that the claim of said Victor Castro was not sub judice on September 28, 1850, or prior thereto, or was subject to disposition otherwise by the United States on said date or that the plaintiff is estopped to deny the validity of its said grant.

It is not true that equitable title of California or any equitable title of these defendants, or any of them, is superior to the title of plaintiff.

XXX.

It is not true that the patent of the United States to California, by relation or otherwise, is of the date of September 28, 1850, or is superior to the decrees of confirmation, or superior to said Executive Orders purporting to reserve said premises for public uses of plaintiff, or that plaintiff is estopped to deny the validity of same.

It is true that the area of the premises conveyed to plaintiff by Bissell, Aspinwall and McArthur, January 4, 1853, was within the boundaries of the

survey referred to in said conveyance and that said survey did include Island No. 1, so-called, as delineated on said charts, and the whole thereof, and included all parts of areas embraced in said Swamp and Overflow Survey [151] No. 34 and some of the area embraced in said Swamp and Overflow Survey No. 569. It is not true that the line depicted on Exhibit "N" as the line of the upland in 1852 was or is the northern boundary of Mare Island or the southern boundary of said premises embraced or claimed to be embraced in said Swamp and Overflow Survey No. 34, or that the northern line of Mare Island as there depicted is the Machine Shop depicted on said maps; that Exhibit "M" is not a copy of any decision of the United States Surveyor General for California relating to the Freeman Survey; but the Freeman Survey was a closed transaction and was finally approved at the time Exhibit "M" was written. (Note for Judge St. Sure: By Exhibit M Defendants' Exhibit 10 for Identification, plaintiff's Exhibit in Evidence No. Z-3 (The Wagner letter of August 7, 1879) is probably intended.)

It is not true that a line drawn from Station 54 to Station 138 on the Freeman Survey constitutes the northern boundary of Mare Island or the southern boundary of any lands embodied or claimed to be embodied in said Survey No. 34, or the southern boundary of any Island No. 1, there being no such island as distinct from Mare Island.

XXXI.

It is not true that plaintiff is estopped to contend in this suit that the said Castro grant was void in law and not in fact a forgery.

XXXII.

It is not true that in the said application of California for certification, Honorable Curtis D. Wilbur, Secretary of the Navy, disclaimed or abandoned the said Executive Orders of President Fillmore reserving Mare Island, or that plaintiff is concluded in any wise from asserting now said Executive Orders, or any claim other than that of its alleged purchase of Mare Island.

XXXIII.

It is not true that the Act of Congress providing for the acquisition of a Navy Yard at Mare Island made or constituted [152] Caleb Cushing, Attorney General of the United States, a special or any tribunal to determine whether the swamp and overflowed portions of Mare Island, or the swamp and overflowed lands abutting said Mare Island had passed to California under the Swamp and Overflowed Land Grant of September 28, 1850, or that any exercise of any such jurisdiction determined that such swamp and overflowed lands had passed to California, or that thereupon the plaintiff applied to California for a cession of the overflowed portion of Mare Island, or that on May 11, 1854, California granted any such application to the extent of ceding to plaintiff the swamp and overflowed lands on the

easterly side of Mare Island south of a parallel intersecting the northern highland of Mare Island at said Machine Shop, and excluded thereby the said lands north of said line running east and west and from ships channel in Napa River to San Pablo Bay, restricting the cession to the lands so described therein, or that any such restriction, with its conditions, was accepted by the plaintiff, nor is plaintiff estopped to claim otherwise.

XXXIV.

It is not true that in the mandamus proceeding referred to in the patent of the United States and in plaintiff's Bill of Complaint it was determined finally that the premises in controversy embraced in Swamp and Overflow Survey No. 34, were part of the public domain of the United States on September 28, 1850.

XXXV.

It is not true that the supervising authority of the Secretary of the Interior over public lands of the United States authorized him to issue any instructions or to take any steps in the exercise of his judgment and discretion as he deemed proper for the ascertaining of the fact whether any of the lands in controversy claimed by California on its said application for certification, including the premises embraced in said Swamp and Overflow Survey No. 34 were swamp and overflowed lands [153] on September 28, 1850, or that in the exercise of his lawful judgment and discretion he took the steps for such purpose as are detailed in paragraph

XII of the Answer filed March 31, 1931. Save for the powers given the Interior Department by the Land Commission Act as Amended, the lands in controversy have been under the exclusive jurisdiction of the Navy Department.

XXXVI.

It is not true that the decisions and records in the suits of San Francisco Savings Union v. Irwin, or Bouldin v. Phelps, are muniments of the title of these defendants or their co-tenants in title, or otherwise, in any controversy between any of said defendants or said co-tenants and the United States. None of the facts established in any of said suits are binding or conclusive on plaintiff herein.

XXXVII.

It is not true that the Cession Act of the State of California of May 11, 1854, is binding on plaintiff as a restriction on plaintiff's claim to any part of the lands granted, held or claimed by Victor Castro and his successors in interest, or any of them conveyed to the United States, nor is claimant estopped from claiming title to the lands here in controversy or any swamp and overflowed lands in either of said townships or any other township falling on Mare Island as granted, conveyed and confirmed as above set forth.

XXXVIII.

It is not true that no part of the premises in controversy was on July 23, 1866, occupied by plaintiff or devoted to public use or was unfit for any

public use, or that up to July 24, 1866, plaintiff had made no substantial improvements or expenditures thereon. It is not true that any alleged occupation of said premises was not open, notorious and visible to the human eye. It is true that one tax was levied upon said lands by the State of California and was paid by present defendants to the [154] State subsequent to the filing of this suit.

XXXIX.

Exhibit "A" attached to defendants' answer is a Coast and Geodetic Survey in accord with the Freeman Survey and binding on plaintiff only so far as it shows the configuration of the coast, and the meanders of the mean high tide line which is the same as the Freeman Survey.

XL.

It is not true that any portion of Mare Island was swamp and overflowed land or public domain of the United States on September 28, 1850, or was subject to the Swamp and Overflowed Grant on said date.

It is not true that Mare Island passed to the ownership of California on her admission into the Union or was not subject to reservation for public use of the United States. It is immaterial that the State of California never consented to the purchase or reservation of any portion of Mare Island except the portion thereof described in said Cession Act, or was competent to limit, or in fact limited, by said Cession Act, to a possession right for the period when Mare Island was occupied by the United States

Navy as a Navy Yard or that any conditions subsequent were accepted by the United States, or that Mare Island was not and is not accessible from any of its sides owing to the swamp and overflowed lands or the tide lands lying between it and navigable waters.

XLI.

That Exhibit "P" referred to and incorporated in said Answer filed March 31, 1931, was made and prepared by the United States Coast and Geodetic Survey pursuant to law in the manner and for the purposes depicted on its face to the extent authorized by Federal statutes and at the time stated on its face; but it is not true that any northern boundary of Mare Island or southern boundary of swamp and overflowed lands later established by State Segregation Swamp and Overflow Survey No. 34 [155] or by any examinations made by the Secretary of the Interior, or by any descriptions inserted in the Federal Patent to California, are depicted thereon or on any other surveys by said Coast and Geological Surveys of the United States, or was adopted by the Board of Officers sent to California to select a site for a Navy Yard or is a boundary survey of said area referred to in said Bissel conveyance, so-called to the United States. It is true that the plat of Township 4 N., R. 4 W., approved March 9, 1904 (Exhibit "F") was made under directions by the Secretary of the Interior to compile the same from maps on file in the Interior Department and from State segregations of swamp and overflowed lands in Napa and Sonoma Counties (the

latter now Solano County), the same being State Swamp and Overflow Surveys Nos. 34 and 569, purportedly pursuant to the second clause of R. S. Sec. 2488, and also in accordance with directions contained in Interior Department letter "E" dated February 2, 1904. It is not true that the lands marked in red lines on said township plats are any part of any Island No. 1 but they are part of the lands covered by Swamp and Overflow Survey No. 569, all marked on said plat by the Surveyor, but not approved by the Secretary of the Interior, on the application of California for certification as alleged in paragraph 12 of said answer of March 31, 1931. It is not true that Exhibit "K" referred to and incorporated in said Answer (or plaintiff's Exhibit "L-16" in Evidence), is the survey of the Board of Officers sent to California to select a site for a Navy Yard nor is the only part conveyed and made part of said Mare Island by Bissell, Aspinwall and McArthur. That said Exhibit "K" is simply a detailed drawing of the proposed improvement of Mare Island. The survey referred to in said conveyance and in the selection by Secretary Kennedy and the reservation by President Fillmore is the survey and plat of Mare Island made by Cadwallader Ringgold in his chart of San Francisco Bay. It is not true that Exhibit "K" (the Cutt's detailed drawing, so-called) [156] is the controlling description of the conveyance from Bissell and Aspinwall to the United States nor that said survey follows the water's edge or the natural boundaries of Mare

Island throughout their entire extent or embraces the entire area of Mare Island or all of the lands that were granted to Victor Castro and by him conveyed to the predecessor in title to the United States. It is not true that the Navy Yard plan attached to said exhibit also shows the area of Mare Island or the southerly line of said Survey No. 34, nor does the same exclude the areas in said State Surveys Nos. 34 and 569.

XLII.

It is not true that the patent of the United States to California approved said State Surveys Nos. 34 and 569 or said State patent to said Darlington or thereby established in California a taxing right, together with police power or the right to exercise eminent domain for the uses of the State, nor is the State a necessary or indispensable party to this suit; nor on issuance of said Federal patent did the fee simple title of the United States vest in California as of the date of September 28, 1850, and it is not true that all or any subsequent adverse action on the part of the plaintiff since that date, by purchase as alleged in the Bill of Complaint, or by reservation for public use, were null and void; and said Federal patent is subject to collateral attack by plaintiff in a suit to quiet title under the laws of California, and of the United States, and in an action to cancel surveys by its own land officers and the approved surveys of the State and its own patent executed in connection with the subject matter of this suit, and the alleged claim of Swamp

and Overflowed Grant; that nothing done on March 9, 1928, by the United States or any of its officers approved or in any wise validated any of the acts done or performed by California and its grantees or in respect to the lands in controversy. [157]

XLIII.

It is not true that James E. O'Donnell is owner in title, or otherwise, with the co-defendants, of 30/100 or any interest, or otherwise; it is not true that Walter E. Burke, as trustee, etc., or otherwise, is entitled as tenant in common, or otherwise, to 27/100, or any interest, undivided or otherwise; it is not true that the estate of Edmund Burke is entitled to the possession of an interest in common, or otherwise, of 3/100 or any interest, undivided or otherwise; none of the defendants Fletcher M. Slosson, Frances Morse, Eleanor Caroline Whitman, are entitled to 40/100 undivided interest, or any interest, in common or otherwise; none of the defendants are entitled to any interest in common, or otherwise, in the premises in controversy.

XLIV.

The answer of Walter E. Burke as trustee for Villa M. Behan, filed January 9, 1931; the answer of defendant Edmund Burke, filed January 9, 1931; the answer of James E. O'Donnell, and Juanita O'Donnell, filed January 16, 1931, and the answer of Fletcher M. Slosson, Dorothy Slosson, Frank Clifford Morse, Frances Morse, and Eleanor Caroline Whitman and Alfred Whitman filed January 26, 1931, are in all respects identical.

XLV.

It is not true that the patent of the United States to California issued March 9, 1928, was duly issued in the absence of fraud, imposition, and/or mistake, but it is true that said patent was issued under a mistake as to the power of the Land Office and a mistaken supposition that the land in controversy was public domain of the United States on September 28, 1850. It is not true that the patent conveyed the legal title thereto to the State of California, or is any evidence thereof as of the date of September 28, 1850. It is not true that any subdivisional survey of said lands was made by authority of the United States in the provisions of the Act of July 26, 1866, or that any survey of the lands returned any of the premises in controversy as swamp [158] and overflowed lands on September 28, 1850; or that amongst any of the lands so returned were any premises described in State Swamp and Overflow Survey No. 34; nor was any description approved or adopted by the United States or carried into its patent to the State of California as its terms of description. Further, it is not true that any accretions, natural or artificial, appertaining or accruing to the premises included in Swamp and Overflow Survey No. 34 have become a part thereof nor that plaintiff has no right, title or interest therein, nor to any part thereof beyond or north of the line or parallel intersecting the northerly highland of Mare Island; whose northerly boundary is not the line of the upland, so-called, of Mare Island existing in 1852, shown on defendants' Exhibit "B", referred to and incorpo-

rated in said Answers, nor was said line the line established by the survey referred to by plaintiff's Exhibit "C"; nor was plaintiff at the time this action was filed, nor is it now, in possession of said survey. The survey and plat referred to in plaintiff's Exhibit "C" was the plat of Mare Island as inscribed on a chart of San Francisco Bay by Cadwallader Ringgold, was used by Secretary Kennedy in making his selection of a site for a Navy Yard; by President Fillmore in reserving the same; and was thereafter duly recorded in the office of the United States Surveyor General for California, where it was apparently destroyed in the San Francisco fire of 1906.

XLVI.

It is not true that the grant by Juan B. Alvarado to Victor Castro did not embrace the premises described in Swamp and Overflow Survey No. 34. It is true that the nunc pro tunc final confirmation of the claim of Bissell and Aspinwall was not followed by an official survey or patent as specified by the Act of March 2, 1851, and its Amendments, before the issue of the Federal patent to California, and in this connection the court finds that in 1877, pursuant to authority given him by law, the Surveyor General for California caused the land confirmed in the [159] Bissell and Aspinwall confirmation to be surveyed by Freeman, and thereafter approved said survey; that said survey was thereafter duly approved by the Commissioner of the General Land Office, as hereinabove stated, and said approved

survey was in all respects validated by said final decree of confirmation. It is not true that the claim of Victor Castro was inferior or subordinate in legal character to the Swamp and Overflowed Land Grant of September 28, 1850, or to the Federal patent to the same by the plaintiff to California, nor did said patent by relation become effective as of the date of September 28, 1850.

XLVII.

It is not true that the conveyance referred to in paragraph V of plaintiff's Bill of Complaint did not embrace the lands described in State Swamp and Overflow Survey No. 34, or any part thereof, but the said conveyance embraced all of said lands. It is not true that the executive order referred to in paragraph VI of plaintiff's Bill of Complaint did not embrace the premises covered in State Survey No. 34, or any part thereof. On the contrary, the court finds that said executive order embraced all of the lands covered by Swamp and Overflow Survey No. 34.

XLVIII.

It is not true that the executive order referred to in paragraph VII did not embrace the premises embraced in said Swamp and Overflow Survey No. 34, or any part thereof. On the contrary, the court finds that it embraced the whole thereof. It is not true that the possession taken by plaintiff of the premises embraced in Swamp and Overflow Survey No. 34 was secured by trespass or without right or color of title, and it is not true that until March 9, 1928, any

of the defendants were without legal capacity to maintain any legal action or equitable proceedings to recover possession of said premises, or to quiet the title of them, or any of them, in or to said premises, or that defendants had no legal or equitable remedy to repel any alleged trespass or entry of plaintiff, or its officers, agents or [160] attorneys. It is not true that defendants, or any of them, did everything they could to resist any entries, intrusions or alleged trespass of the plaintiff or its agents, prior to its acquiring said Federal patent to the State of California.

XLIX.

It is not true that any of the allegations in paragraph XII of plaintiff's Bill of Complaint are a collateral attack on any final decree or judgment of the Supreme Court of the District of Columbia. In this connection the court finds the United States of America was not a real or substantial party to the Mandamus Proceeding referred to and is not concluded by any judgment rendered therein. It is not true that the premises in controversy were a part of the public domain on September 28, 1850. It is not true that any township survey, including field notes, or report of the Surveyor were approved or accepted by the Secretary of the Interior, or returned any of said pemises as swamp and overflowed land as provided in and directed by the terms and provisions of the Act of July 23, 1866, nor did said or any identification confirm said patent issued by the State of California to David M. Darlington.

L.

It is not true that the survey referred to in plaintiff's Exhibit "C", or the chart or map referred to in plaintiff's Exhibit "D" have been suppressed by plaintiff, but the court finds that the survey and plat referred to in the deed, the selection of Secretary Kennedy and the reservation of President Fillmore was Mare Island as shown on the chart of San Francisco Bay by Cadwallader Ringgold; that said chart used by President Fillmore in reserving Mare Island was duly recorded and preserved in the office of the United States Surveyor General of California and was destroyed in the fire of 1906.

It is not true that the United States Surveyor General for California in the exercise of his judgment or discretion determined that the northerly boundary of Mare Island [161] extended to a point or station on San Pablo Bay to a point or station on the Napa River, the first station being designated on Freeman's Survey as Station 34, to said second station No. 138. It is not true that said alleged decision, so-called, of said Surveyor General was never modified by the Secretary of the Interior or was in full force or effect on the day the said fee simple patent issued by the plaintiff to the State of California; nor is it true that the said line is the northern line of Mare Island or is the southern boundary line of said premises said Swamp and Overflow Survey No. 34, nor does the northern boundary of Mare Island closely approximate the parallel intersecting the northerly highlands of Mare Island as depicted on defendants' Exhibit "B".

CONCLUSIONS OF LAW.

From the foregoing Findings the court concludes as a matter of law that plaintiff is entitled to a judgment and decree adjudging and decreeing that complainant is the owner in fee simple absolute and possessed of all the real property described in paragraph II of plaintiff's Bill of Complaint, being the lands described and attempted to be described in said Swamp and Overflow Survey No. 34, and in the patent of said lands from the United States to the State of California; also adjudging and decreeing that neither the defendants nor any of them ever acquired or now have any right, title or interest in or to said lands or any part thereof by reason of the purported patents, conveyances or instruments mentioned or referred to in plaintiff's Bill of Complaint, and adjudging and decreeing that the conveyances and instruments through and by virtue of which defendants claim to derive a right, title or interest in the lands in question under David M. Darlington, patentee, from the State of California, and his grantees are void and of no effect; and that each such conveyance made to him and held by defendants be held for naught, surrendered and delivered up to the court for cancellation; that title in and to the lands described in paragraph II of [162] plaintiff's Bill of Complaint be quieted in complainant as against all or any adverse claim or claims of defendants herein or any of them, and that defendants be enjoined and restrained from asserting any rights contrary to the right, title and interest of plaintiff; that plaintiff recover its costs of suit.

Done in open court this 29th day of December, 1933.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Jan. 17, 1934. [163]

In the Southern Division of the United States District Court for the Northern District of California

In Equity No. 2787-S

UNITED STATES OF AMERICA,

Complainant,

vs.

JAMES E. O'DONNELL, JUANITA O'DONNELL, his wife, FLETCHER M. SLOSSON, DOROTHY SLOSSON, his wife, FRANK CLIFFORD MORSE, FRANCES MORSE, his wife, ELEANOR CAROLINE WHITMAN, formerly ELEANOR CAROLINE FRENCH, ALFRED WHITMAN, her husband, WALTER E. BURKE, as administrator of EDMUND BURKE, deceased, WALTER E. BURKE, as trustee for VILLA M. BEHAN, VILLA M. BEHAN, formerly VILLA M. BURKE, S. J. SIMONS, V. M. PRICE, E. J. SULLIVAN, First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, Eighth Doe, Ninth Doe and Tenth Doe, also all other persons unknown claiming any right, title, estate, lien or interest in the real property described in the Complaint adverse to Complainant's title thereto,

Defendants.

DECREE.

This cause having duly come on for trial before the above entitled court sitting without a jury, the

parties being represented by their respective attorneys, and the court having made its Findings of Fact and Conclusions of Law, and being duly advised in the premises:

It is adjudged and decreed that Complainant is the owner in fee simple absolute and possessed of all the real property described in paragraph II of Plaintiff's Bill of Complaint, to wit, being the lands described and attempted to be described in California State Swamp and Overflow Survey No. 34 and in the patent of said lands from the United States to the State of California, and which said lands are situated on Mare Island, in the County of Solano, State of California, and in the Northern Division of the Northern District of California, and are parti- [164] cularly described as follows:

"All that parcel and body of land known and designated as tract No. 38, containing 1473.95 acres, more or less, shown upon the approved and accepted United States public survey map of 1923 covering fractional Township 3 North, Range 4 West, M.D.B. and M., California, together with all accretions, natural or artificial, to said lands or any part thereof, which tract and body of land includes, as the defendants claim, within its northerly portion, a strip or lot of ground reported to have been surveyed in the year 1856 on behalf, and under the authority of the State of California and purportedly returned and described as State Swamp and Overflow Land Survey No. 34 con-

taining 164.55 acres and designated as a fractional portion of the south one-half of the southeast quarter of section 10, the northeast fractional portion of the northeast quarter of section 15, the southwest fractional portion of the northwest quarter of section 14, and the northeast fractional portion of the southwest quarter of section 14 in said township 3 north, range 4 West, M. D. M. and M."

It is further adjudged and decreed that the defendants herein have not, nor has any of said defendants any right, title or interest in or to said lands or in or to any part thereof, by reason of the purported patents, conveyances or instruments mentioned or referred to in Plaintiff's Bill of Complaint, or for any reason.

It is further ordered, adjudged and decreed that the conveyances and instruments, including the alleged patent dated March 18, 1857, purporting to convey said lands included in [165] California State Swamp and Overflow Survey No. 34, a copy of which patent is annexed to Plaintiff's Complaint and marked Exhibit "E" and referred to and incorporated therein, and especially including the listing of the said lands by the Secretary of the Interior of the United States to the State of California as swamp and overflowed lands, made on March 9, 1928, and the alleged patent from the United States of America to the State of California bearing date the 9th day of March, 1928, purporting to convey said real property from the United States to the

State of California, a copy of which said patent is annexed to Plaintiff's Bill of Complaint and marked Exhibit "F" and referred to and incorporated therein, through and by virtue of which defendants claim to derive a right, title or interest in or to the lands in question under David N. Darlington, patentee from the State of California, and his grantees, are and each of them is void and of no effect, and that said conveyances made to the said David N. Darlington and held by defendants be and the same are void and held for naught.

It is further ordered, adjudged and decreed that said conveyances and instruments be surrendered and delivered up to the court for cancellation.

It is further ordered, adjudged and decreed that title in and to the lands described in paragraph II of plaintiff's Bill of Complaint and hereinabove described be and the same is hereby quieted in Complainant as against all or any adverse claim or claims of defendants herein or of any of them, and that defendants be and they are hereby enjoined and restrained from asserting any rights contrary to the right, title and interest of plaintiff therein. [166]

The Court having on July 31, 1933, ordered judgment for plaintiff, and it appearing that one of the defendants therein, Walter E. Burke, died on August 18, 1933, and due cause therefor appearing, it is ordered that this Decree shall take effect as of said 31st day of July, 1933.

It is further adjudged and decreed that Plaintiff recover its costs taxed to the sum of $220.50.

Done in Open Court this 29th day of December, 1933.

A. F. ST. SURE,
United States District Judge.

Approved as to form as provided in Rule 22.

Appearing in propria persona

[Endorsed]: Filed and entered Jan. 17, 1934. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk. [167]

[Title of Court and Cause.]

PETITION FOR SUBSTITUTION OF ATTORNEYS AND ORDER THEREON.

Comes now Villa M. Behan, formerly Villa M. Burke, who has heretofore appeared in said cause by her trustee, Walter E. Burke, and hereby respectfully shows to the Court that said Walter E. Burke died on the 18th day of August, 1933.

That said Walter E. Burke has also appeared in said action as administrator of the estate of Edmund Burke, deceased.

That your petitioner has been appointed administratrix of the estate of said Edmund Burke, deceased, in the place and stead of Walter E. Burke.

That your petitioner desires to join in and to prosecute an appeal from the decree heretofore given and made in the above entitled cause in her own

proper person in the place and stead of Walter E. Burke, trustee, and, also, in the capacity of administratrix of the estate of Edmund Burke, deceased, in the place and stead of Walter E. Burke, administrator of the estate of Edmund Burke; and, for that purpose, does hereby appoint James E. Kelby and Gordon Lawson as her solicitors in the place and stead of Walter E. Burke, deceased; and hereby respectfully requests the Court to permit said substitution to be made upon the records, files, and papers in said proceeding.

VILLA M. BEHAN,
Petitioner.
formerly Villa M. Burke.

It is so Ordered:
A. F. ST. SURE,
Judge.
Dated: Jan'y. 17, 1934. [168]

United States of America,
Southern District of California,
Central Division—ss.

Villa M. Behan, formerly Villa M. Burke, being by me first duly sworn, deposes and says: that she is the petitioner in the above entitled action; that she has read the foregoing petition and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are

therein stated upon her information or belief, and as to those matters that she believes it to be true.

VILLA M. BEHAN,
formerly Villa M. Burke.

Subscribed and sworn to before me this 14th day of December, 1933.

[Seal] SAMUEL M. GARROWAY,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jan. 17, 1934. [169]

[Title of Court and Cause.]

PETITION FOR ORDER TO SUBSTITUTE VILLA M. BEHAN, formerly VILLA M. BURKE, IN THE PLACE AND STEAD OF WALTER E. BURKE, as trustee.

Comes now Villa M. Behan, formerly Villa M. Burke, by her solicitors, James E. Kelby and Gordon Lawson, and respectfully shows to the Court that she is one of the defendants named in the above cause, appearing herein by her said trustee, Walter E. Burke.

That Walter E. Burke died on the 18th day of August, 1933.

That the trust under which said Walter E. Burke was acting during his lifetime for said Villa M. Behan, formerly Villa M. Burke, arose out of the execution and delivery of a grant deed to Walter E.

Burke, during his lifetime, as trustee for Villa M. Behan, formerly Villa M. Burke, of an undivided twenty-seven percent (27%) interest in and to certain of the lands and premises involved in the above entitled action; that the trust so created is a naked trust and no provision is contained therein for the appointment of a new trustee upon the death or resignation of the trustee appointed thereby; that Villa M. Behan, formerly Villa M. Burke, is the sole beneficiary named in said grant deed, and is the sole beneficiary in the trust created thereby.

That said Villa M. Behan, formerly Villa M. Burke, desires to appear in said action in her own proper person and to join with the other defendants in said action in the prosecution of an appeal from the decree heretofore given and made in the above entitled cause. [170]

WHEREFORE, your petitioner prays that an order may be made herein substituting Villa M. Behan, formerly Villa M. Burke, in her own proper person, in the place and stead of Walter E. Burke, as trustee for said Villa M. Behan, formerly Villa M. Burke.

VILLA M. BEHAN,
formerly VILLA M. BURKE, and
KELBY E. LAWSON,
Solicitors for Petitioner.

It is so Ordered:

A. F. ST. SURE,
Judge.

Done in open court this 13 day of February, 1934.

United States of America,
Northern District of California,
Southern Division—ss.

Villa M. Behan, formerly Villa M. Burke, being by me first duly sworn, deposes and says: that she is the petitioner in the above entitled action; that she has read the foregoing petition and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

VILLA M. BEHAN,
formerly Villa M. Burke.

Subscribed and sworn to before me this 9th day of February, 1934.

[Seal] SAMUEL M. GARROWAY,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Feb. 13, 1934. [171]

[Title of Court and Cause.]

PETITION FOR SUBSTITUTION OF VILLA M. BEHAN AS A PARTY DEFENDANT IN THE PLACE AND STEAD OF WALTER E. BURKE, AS ADMINISTRATOR OF THE ESTATE OF EDMUND BURKE, DECEASED.

Comes now James E. Kelby and respectfully suggests to the Court the following matters and things

happening subsequent to the decision heretofore rendered in the above cause:

That Walter E. Burke, who is named as one of the defendants herein as administrator of the estate of Edmund Burke, deceased, died on the 18th day of August, 1933.

That, thereafter, such proceedings were had and taken in the matter of the estate of Edmund Burke, deceased, in the Superior Court of the State of California, in and for the County of Los Angeles, that Villa M. Behan was appointed administratrix of the estate of Edmund Burke, deceased, in the place and stead of Walter E. Burke, administrator, now deceased.

WHEREFORE, affiant prays that an order be made herein substituting said Villa M. Behan as administratrix of the estate of Edmund Burke, deceased, in the place and stead of Walter E. Burke, as administrator of the estate of said Edmund Burke, now deceased.

KELBY & LAWSON,
JAMES E. KELBY,
Solctrs. for movant.

It is so Ordered:
A. F. ST. SURE,
Judge.

Done in open court this 13 day of February, 1934.

[172]

United States of America,
Northern District of California,
Southern Division—ss.

James E. Kelby, being by me first duly sworn, deposes and says: that he is the petitioner in the above entitled action; that he has read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

JAMES E. KELBY.

Subscribed and sworn to before me this 9th day of February, 1934.

[Seal] SAMUEL M. GARROWAY,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Feb. 13, 1934. [173]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

(NOTE: Plaintiff's exhibits "A" to "U", inclusive, and the testimony respecting same, were offered and received in evidence, subject to reserved objections by defendants, which have been incorporated and are found in defendants' written motion to exclude, set forth in the transcript herein; objections to the remainder of plaintiff's exhibits, and the exceptions to the rulings thereon, are set forth in the statement of evidence.)

TESTIMONY OF MISS IVA FRANCES BAILEY

A Witness for Plaintiff.

I am an employee in the office of the United States Surveyor General for California and have been there for thirty-seven years. Prior to the San Francisco earthquake and fire in 1906, there was in the possession and in the custody of that office the records and archives of the Mexican Government of California, also the records of land claims under Spanish grants presented to the Land Commission in California. I understand that all original papers connected with the grant were also on file in the office. The effect of the fire of 1906 was a total destruction of all of these papers with the exception of a few that were in the safe.

TESTIMONY OF FRANK E. BARKER.

A Witness for Plaintiff. [174]

I am the office cadastral engineer in the Office of the Public Survey, which was formerly the United States Surveyor General for California. I have been there since 1909. I have had occasion to make a search through the archives of that office for the records and archives of the Mexican Government prior to the acquisition of California by the United States and have found some of them. The proceedings before the Land Commission in the case of the confirmation of Mare Island I have been un-

(Testimony of Frank E. Barker.)

able to find. There appears to be an incomplete expediente on the original documents that were submitted as exhibits to the Land Commission at the time of the application for confirmation. I do not find the original document of the grant from Juan B. Alvarado to Castro, nor the original conveyance from Castro and wife to Frisbee & Simmons, granting a one-half interest, nor a deed from Victor Castro to George Bissell, of a one-tenth interest in the property, nor a deed from Frisbee & Simmons to Victor Castro, of a one-tenth interest in the property, nor a deed from Billings, Patton & Halleck, as assignees of Simmons, to George Bissell, of an undivided sixty-seven/eightieths of Mare Island, or any other deed to them. I did not find a deed from Simmons to Billings, Patton & Halleck, nor a deed from Simmons & Stowell to Billings, Patton & Halleck, purporting to convey an undivided one-half of sixty-seven/eightieths of Mare Island, nor a deed dated October 5, 1849, from Victor Castro by Mariano C. Vallejo, as Attorney-in-Fact to Bissell, Simmons & Frisbee. I found a record of these documents before the Land Commission in the records and application for confirmation in the Land Commission.

Mr. BURKE: I am going to stipulate to all of these conveyances. I will stipulate that any right, title or interest that Victor Castro had under the grant of Mare Island was passed through him to successors who subsequently transferred the same to the United States of America. Of course, I do not

(Testimony of Frank E. Barker.)

stipulate the grant. I will stipulate that Victor Castro made application for this Mare [175] Island and that a temporary license was issued to him by Jimeno, the Secretary of State.

WITNESS continuing: I produce now the Dyer Survey. I also produce the Joy Survey.

The COURT: That first map introduced was the Dyer Survey and that is the map which has the pencil marks upon it with an asterisk in the upper portion of the figure below the word and number "Section 10" and on one side of this pencil mark appears the legend, "Surveyed June 11 and 12, 1855, by County Surveyor for David N. Darlington," etc. Is this what is known as the Dyer Survey or plat of the Dyer Survey?

A. Yes.

(The Dyer Survey and Joy Survey were offered in evidence as "Plaintiff's Exhibits A and B", respectively.)

The COURT: Referring to Exhibit "B", what does that plat show?

A. This is a sectionized survey of a portion of Mare Island, excluding Swamp and Overflowed Tract 34.

Mr. PECKHAM: We offer from the record in United States vs. Bissell and Aspinwall, a certified copy of the transcript of proceedings before the Land Commission in the matter of the application for the confirmation of the Victor Castro grant, also copy of the expediente and the translation thereof used by the Land Commission, the order of reference and the informe and return of the Justice

(Testimony of Frank E. Barker.)

of the Peace, also grant of Juan B. Alvarado to Victor Castro of Mare Island.

Mr. BURKE: Why do you want to put those in? I have stipulated to those.

Mr. PECKHAM: I understand that counsel is stipulating that the title of Victor Castro passed by mesne conveyances from the confirmees to the United States.

Mr. BURKE: Any title that he had passed to the United [176] States through the Bissell conveyance, if he had any.

Mr. PECKHAM: We offer the decree of confirmation and the opinion of confirmation by the Land Commission, showing confirmation of Mare Island to Bissell and Aspinwall, together with the entire record in the United States District Court in the case of United States vs. Bissell and Aspinwall, No. 311.

(The record in case No. 311, United States vs. Bissell, et al., is offered in evidence as "Plaintiff's Exhibit C".)

PLAINTIFF'S EXHIBIT C

[Endorsed]: Filed June 18, 1934. United States Circuit Court of Appeals.

TRANSCRIPT OF THE PROCEEDINGS

In Case

No. 307

G. W. P. BISSEL and
WILLIAM H. ASPINWALL,

Claimants,

vs.

THE UNITED STATES,

Defendant,

For the Place Named
"YSLA de YEGUA" or "MARE ISLAND"

Office of the Board of Commissioners,
To ascertain and settle the Private Land Claims
In the State of California.

BE IT REMEMBERED, that on this thirty first day of August, Anno Domini One Thousand Eight Hundred and Fifty-two, before the Commissioners to ascertain and settle the Private Land Claims in the State of California, sitting as a Board in the City of San Francisco, in the State aforesaid, in the United States of America, the following Proceedings were had, to wit;

The Petition of G. W. P. Bissel & William H. Aspinwall, for the Place named "Ysla de Yegua" or "Mare Island", was presented, and ordered to be filed and docketed with No. 307 and is as follows, to wit;

(Vide page 3 of this Transcript.)

Upon which Petition the following subsequent Proceedings were had in their chronological order, to wit;

San Francisco, April 20, 1854.

In Case No. 307, G. W. P. Bissell et al: for the "Ysla de Yegua", the deposition of Stephen Cooper, a witness in behalf of the United States, taken before Commissioner Peter Lott, was filed;

(Vide page 5 of this Transcript.)

San Francisco September 26, 1854.

Case No. 307 was ordered to be placed at the foot of the 2d class cases on the Trial Docket.

San Francisco, October 12, 1854.

In the same case the deposition of Juan B. Alvarado, a witness in behalf of the Claimants, taken before Commissioner Peter Lott, was filed;

(Vide page 9 of this Transcript.)

San Francisco, October 19, 1854.

In the same case the deposition of Mariano G. Vallejo, a witness in behalf of the Claimants, taken before Commissioner Alpheus Felch, was filed;

(Vide page 19 of this Transcript.)

San Francisco, Oct. 20, 1854.

In the same case the deposition of Juan José Castro, a witness in behalf of the Claimants, taken before Commission Peter Lott, was filed;

(Vide page 21 of this Transcript.)

San Francisco November 1, 1854.

In the same case the deposition of William McDaniel, a witness in behalf of the United States, taken before Commissioner R. Aug. Thompson, was filed;

(Vide page 25 of this Transcript.)

San Francisco, November 6, 1854.

In the same case the deposition of L. B. Meizner, a witness in behalf of the United States, taken before Commissioner S. B. Farwell, was filed;

(Vide page 27 of this Transcript.)

San Francisco, November 7, 1854.

Case No. 307 was submitted on briefs and taken under advisement by the Board.

San Francisco, May 8, 1855.

In the same case Commissioner S. B. Farwell delivered the opinion of the Board confirming the claim;

(Vide page 65 of this Transcript.)

and the following order was made towit:

(Vide page 69 of this Transcript.)

PETITION

To the Honorable Commissioners to Settle Private Land Claims in California.

The petitioners George W. Bissell and William H. Aspinwall respectfully show.

That on the 31st day of October A. D. 1840 Manuel Jimeno Casarin Governor ad interim of California made a provisional grant to Victor Castro of the Island called "Isla de la Yegua" in the present County of Sonoma.

That on the 20th day of May A. D. 1841, Juan B. Alvarado Gov of California by virtue of authority of law in him vested granted to the said Victor Castro in fee the said tract of Land Mare Island a copy of which grants are herewith submitted marked "A". with a translation marked "B".

That on the 28th day of May A. D. 1850 the said Victor Castro sold and conveyed the said tract of land to said John B. Frisbee and Bezer Simmons of the firm of S. H. & Co. a copy of which conveyance is submitted herewith marked "C".

That on the 3d day of September A. D. 1850 the said Bezer Simmons and the said Simmons Hutchinson & Co. by Deeds of Assignment conveyed his interest in the said tract of land to F. Billings, I. R. Bolton and H. W. Halleck a copy of which Deeds of Assignment is submitted herewith marked "D".

That on the 15th day of August A. D. 1850 the said John B. Frisbee sold and conveyed a part of his interest in said tract of land to the petitioner William H. Aspinwall, a copy of the record of

which conveyance is submitted herewith marked "E".

That on the 16th day of July A. D. 1852 the said John B. Frisbee sold and conveyed his remaining interest in said island to the petitioner G. W. P. Bessell a copy of which conveyance is submitted herewith marked "F".

That on the 1st day of July A. D. 1852 the said Billings, Bolton and Halleck sold and conveyed to the petitioner G. W. P. Bissell the interest of said Bezer Simmons and Simmons Hutchinson and Company in the aforesaid tract of land a copy of which conveyance is submitted herewith marked "G".

That on the 25th day of May A. D. 1850 the said Simmons and Frisbee sold and conveyed to Victor Castro one undivided tenth part of said island as shown by the original conveyance a copy of which conveyance is submitted herewith marked "H".

That on the 20th day of July A. D. 1852 the said Castro sold and conveyed the said one undivided tenth part of said island to the petitioner G. W. P. Bissell a copy of which conveyance is submitted herewith marked "I".

And the petitioners further show that the said tract of land has not been surveyed by the Surveyor General of the United States such survey not being necessary, the land being an island and its boundaries easily defined; that moreover the petitioners and those under whom they hold have been for 12 years and now are in the quiet and undisputed possession and occupation of said island.

That they know of no conflicting claim. That they rely for confirmation of title upon the original papers, copies of which are submitted herewith upon the records and minutes in the archives now in charge of the Surveyor General and upon such other and further proofs as they may be advised are necessary.

Wherefore they pray the Commissioners to confirm to them the aforesaid tract of land.

By their Attys.

Halleck, Peachy & Billings

Filed in office Aug. 31, 1852.

(Signed) Geo. Fisher Secy.

DEPOSITION OF S. COOPER

United States of America,
State of California.—ss.

San Francisco, April 20, 1854.

This day personally came before Peter Lott a Commissioner for taking testimony to be used before the Board of U. S. Land Commissioners in said State Stephen Cooper a witness on behalf of the United States in Case No. 307 on the docket of said Board wherein G. W. Bissell and William H. Aspinwall are claimants. And the said witness being duly sworn on oath deposed in the English language as follows, to wit:

The Claimants Attorney is present.

1st Question.

What is your name, age and present residence?

Ans. My name is Stephen Cooper. My age is 57 years. My residence Solano County California.
2d Question.

Are you acquainted with Isla de la Yegua (Mare Island). If yea state where it is, how far you reside from it and how long you have known it?

Ans. I am acquainted with the island mentioned. It is situated in San Pablo Bay just below the Straits of Carquinas about 6 miles from Benicia. I was some 11 miles from it. I have known the island ever since the fall or early winter of 1847.
3d Question.

Look at the paper now shown you marked Exhibit No. 1 to the Deposition of Stephen Cooper, P. L. and say whether you have ever seen it before. If yea, state where, when and under what circumstances?

Answer.

I believe I have seen the paper before. I would not sware to a bit of paper. I have seen a similar paper.

I do not remember the time precisely when I saw the paper, but it was some time in 1850, at Benicia. It was shown to me by Capt. Frisbee who claimed to have a title to the island from Victor Castro. Frisbee showed me the paper to proove his title to the island, because he understood I was backing some young men who were occupying the island against his wishes and I had told him if he had a good title he should have no trouble with the young men.

His object was to get the young men off and get the possession himself. Lancing B. Meisner acted as interpretor for me when the paper was produced on that occasion. I called Capt. Frisbee's attention to the writing on the 2d page of the document and told him—

It is strange this writing appears here now, and it was not here in the winter of 1847 & 1848. He asked me if I thought that he forged it. I replied I did not, but I thought somebody had.

4th Question.

Did you ever get Mr. Misner to act as interpretor or translator of any document relating to Mare Island more than once?

Answer.

Never except the one time.

5th Question.

State why you informed Capt. Frisbee that the grant had been written on the paper after the year 1848?

Answer.

I am not able to say whether I judged from my having seen the paper and noticed the difference by ocular inspection or whether it was heresay which directed my attention to that point, and induced me to speak to him of it as I did. I had in the winter of 1847 and 1848 sent to Monteray to have the archives searched as Castro said he had a title then. I then thought of purchasing but I learned in some way that there was no sufficient title and gave up all idea of buying whether I saw the paper or not. I do not recollect.

I may have been informed of its character through Dr. Simple who went to Monteray for me or through others.

Claimants Counsel objects to the proofs respecting the archives as illegal.

Cross Examined by Claimants Counsel

1st Question.

What time in 1847 was it that you were negotiating or talking of a purchase of the island, and with whom?

Answer.

I cannot say nearer than that it was in the winter of 1847 or 1848. It was rainy weather. It was with Victor Castro, Doct. Simple and myself. The Dr. had learned some Spanish and did the talking.

2d Question.

When you were having this conversation, were the papers exhibited to you?

Answer.

I do not think they were. Dr. Simple went to Castro house with him to see his papers.

3d Question.

When was the time then that you saw the papers which has been exhibited to you here?

Answer.

The time was in the spring of 1850 or about that time when Capt. Frisbee showed it to me as I before stated.

Stephen Cooper

Subscribed and sworn to before me on this 20th day of April A. D. 1854.

Peter Lott
Commissioner for taking testimony &c.

Filed in office Aug. 20, 1854.

(Signed) Geo Fisher Secy.

DEPOSITION OF JUAN B. ALVARADO.

United States of America,
State of California—ss.

San Francisco, Oct. 10, 1854.

This day came before Peter Lott, Commissioner for taking testimony to be used before the Board of U. S. Land Commissioners in said State, Juan B. Alvarado a witness on behalf of the claimants G. W. P. Bissell and William H. Aspinwall in Case No. 307 on the docket of said Board and said witness being sworn deposed in Spanish which is interpreted by the interpreter to said Board as follows.

The U. S. Law Agent is present.

Questions by Capt. Halleck, Attorney for claimant.

1st Question:

What is your name, age and residence?

Answer:

My name is Juan B. Alvarado. My age 43 years, and residence, Contra Costa County, California.

2d Question:

Are you acquainted with the place called Mare Island. If yea, where is it?

Answer:

I am acquainted with it. It *it* is in the Bay of San Francisco near the Straits of Carquinas.

3d Question:

Did you ever as Governor of California make a grant of said Island to any one. If yea, to whom?

Answer:

I did as Governor, grant it to Victor Castro.

4th Question:

Look at the document, now shown to you, marked Exhibit 1 to deposition of S. Cooper. P. L. and also exhibited in this deposition and heretofore filed in this case and state if you know the handwriting and signatures to said document if yea. State your means of knowledge and also whether they are genuine?

Answer:

I know the handwriting of Manuel Jimeno and Jose Z. Fernandez. I have seen them both write and their signatures as they here appear are genuine and this is also my own proper signature which I signed here at the time the paper was dated.

The body of said document on the first page is written by said Jose Z. Fernandez and the body of the second page is in my own hand writing.

5th Question:

State what you know of the occupation of said Island by said Victor Castro?

Answer:

In the year 1844 as I passed by the Island I saw horses on it belonging to said Castro and Castro

and I took horses from the Island and crossed over and went to Sonoma. I understood and was well satisfied said Castro occupied said Island before he obtained said grant.

6th Question:

Is the place called by this name an Island surrounded by water?

Answer:

I think it is an Island.

Cross Examined by U. S. Law Agent.

1st Question:

Do you know where the Bay of San Pablo is?

Answer:

I think I do. It is a part of the Bay of San Francisco.

2d Question:

Is Mare Island in the Bay of San Pablo?

Answer:

No.

3d Question:

Are you acquainted with Mr. Frisbee's son-in-law, Genl. Vallejo?

Answer:

Yes. I am.

4th Question:

Have you ever had any conversations with him about this Mare Island?

Answer:

I do not remember ever to have had any conversation with him on this subject.

5th Question:

Have you a distinct recollection of having signed the document which has been exhibited to you in this case?

Answer:

I do not remember the act of signing it, though I know it is my signature and that I did sign it I have no doubt.

6th Question:

Where were you when you signed it?

Answer:

I ought to have been at the place where the paper is dated. I ought to be in Monterey.

7th Question:

Do you recollect positively where you were when you signed said document?

Answer:

I recollect what I have already answered.

8th Question:

Do you decline to give a direct answer about your recollection?

Answer:

I do not.

9th Question:

Then answer the question directly whether you remember where you were when you signed it?

Answer:

I would say independent of the document as a means of refreshing my memory that I was at Monterey.

10th Question:

In what house at Monterey were you?

Answer:

I do not remember.

11th Question:

Do you know independent of the wording of the instrument, that you signed it in Monterey?

Answer:

I do know that I did sign it in Monterey, independent of the wording of the document.

12th Question:

By what circumstances do you recollect it?

Answer:

Because I was Governor and I was at the head of the Department at the seat of Government at that time.

13th Question:

Who was Secretary at that time?

Answer:

I think Jimeno was.

14th Question:

Who petitioned for the grant in this case?

Answer:

I do not remember.

15th Question:

Was there any record of said grant kept in the archives?

Answer:

I do not remember.

16th Question:

Was it usual to keep a record of such grants?

Answer:

There was a book in which an entry was made of such grants generally though the Secretary might forget it.

17th Question:

How many grants did you ever make and write them out yourself?

Answer:

I cannot remember how many.

18th Question:

Did you ever write any besides this?

Answer:

I think I have.

19th Question:

What one?

Answer:

I cannot recollect now any particular one.

20th Question:

Why did you write this grant?

Answer:

I did it because I choose to do it and had the authority to do it.

21st Question:

In whose presence did you write?

Answer:

I do not remember.

22d Question:

Do you recollect having written it?

Answer:

I do not remember the act of writing it.

23d Question:

How long after you signed the Yerba Buena Island grant did you sign this grant?

Answer:

I do not remember.

24th Question:

How long before you signed it was it that you saw the horses on the Island?

Answer:

I never saw any horses there before I signed the title.

25th Question:

Why did not Jimeno sign this grant as Secretary?

Answer:

It might have happened that I did not order him to do it, or that he forgot it.

26th Question:

From whom did you receave this document when you wrote and signed the grant?

Answer:

I do not now remember from whom I receaved it.

27th Question:

How long was it in your possession before you wrote the grant in it?

Answer:

I do not recollect.

28th Question:

Had the paper been filed before you wrote the grant?

Answer:

I do not remember whether it had.

29th Question:

Had it ever been in the hands of the interested party before you wrote the grant on it?

Answer:

I do not recollect now, tho it is probable it had been.

30th Question:

Had you ever seen it before the time when you wrote the grant?

Answer:

I do not remember to have seen it before that occasion.

31st Question:

Had you ever heard of it before?

Answer:

Yes I had. I believe that Jimeno told me at Monteray about the time I made the grant that he had given the provisional grant to the Land.

32d Question:

Was it before or after you made the grant?

Answer:

I believe he told me before.

33d Question:

How long before?

Answer:

I do not remember.

34th Question:

Where were you when he told it to you?

Answer:

I think I was in Monterey. I cannot remember the exact house or spot.

35th Question:

What led to the conversation?

Answer:

I do not remember.

36th Question:

What did he tell you?

Answer:

I do not remember.

37th Question:

Had you ever been at Mare Island before you made the grant?

Answer:

I had not.

38th Question:

When did you first know it by that name?

Answer:

I have heard it called by that name for a long time. I do not know how long, but I heard it before I made the grant.

39th Question:

From whom did you hear it?

Answer:

I cannot remember any particular person. It was publicly called and known by that name. I recollect Jimeno told me of the grant by him and spoke of it by that name.

40th Question:

What did you know of said Island before you made the grant?

Answer:

I had never seen it or had any personal knowledge of it before that. I had heard that Victor Castro

either had put on or was about putting horses on the said Island and occupying it.

41st Question:

Had you heard anything else about it?

Answer:

I do not remember to have heard anything else.

42d Question:

How many grants did you make of land while you were Governor where you had no knowledge either by report or otherwise of the land?

Answer:

I do not remember.

43d Question:

Did you ever make any without such knowledge?

Answer:

Yes. Various ones.

44th Question:

Name some of them.

Answer:

I do not remember any besides the grant in question.

45th Question:

Was it not your constant practice when you were ignorent of the land applied for to refer it to some local authority for report or information before you made the grant?

Answer:

It was not. I required such information in some cases, and not in others as it suited my views at the time.

46th Question:

Without information on the subject how could you tell what to grant?

Answer:

I knew or understood in some manner sufficient to decide upon the business of my Government at that time.

47th Question:

In what manner did you know enough in this case for the purpose of granting the Island in question?

Answer:

I got information from Jimeno of the business before I made the grant. I do not now remember what he told me.

48th Question:

How did you know Castro wanted the grant?

Answer:

Probably Jimeno told me so.

49th Question:

State all that Jimeno had to do with making the grant or giving information in the case?

Answer:

I cannot now recollect the particulars of this matter, but it is most likely that Jimeno had same proceedings in the business and informed me of it, and that I therefore went on and made the grant out. I cannot be posative as to the exactness of what did transpire.

50th Question:

Why did you not as was your usual custom first make a decree annexed to the Expedient and then make the grant on a separate piece of paper?

Answer:

Because I was sufficiently well satisfied with what I did.

JUAN B. ALVARADO.

Subscribed and sworn to before me on this 10th day of October A. D. 1854.

PETER LOTT,
Commissioner.

Filed in office Oct. 12, 1854.

(Signed) GEO. FISHER,
Secy.

DEPOSITION OF M. G. VALLEJO.

United States Land Commission.

San Francisco, Oct. 19, 1854.

On this day before Commissioner Alpheus Felch came Mariano G. Vallejo a witness on behalf of the claimants G. W. P. Bissell et al. Case No. 307 who after being duly sworn deposed as follows:

Questions by Capt. Halleck attorney for claimants.

1st Question:

Please state your name, age, and place of residence?

Answer:

My name is Mariano G. Vallejo. My age 47 years and I reside at Sonoma in California.

2d Question:

Do you know the place called Mare Island. If yea, where is it situated?

Answer;

I do know it. It is an Island in San Pablo Bay at the mouth of Napa Creek. The Island is some two

and a half miles in length. It is irregular in its width and contains about a half a league of land, a little more or less.

3d Question:

State what you know of the occupation of the Island?

Answer:

I was occupied by Victor Castro a long time ago by putting his horses on it. He commenced putting them there in 1839 or 1840 according to my best recollection and continued to keep them there until 1850. He had a little correl there. The horses were seventy or eighty in number.

4th Question:

Did you ever see the title papers of said Island. If yea, when?

Answer:

I saw them some twelve years ago.

5th Question:

Please look on the paper now here presented to you being marked "Exhibit 1 to Depo. of S. Cooper P. L." heretofore filed in this case and also marked as filed on the tenth day of Sept. 1853 and state whether this is the title paper alluded to in the last question and answer?

Answer:

It is the same.

M. G. VALLEJO.

Mr. McKum, Law Agent, attended at the taking of this deposition but propounded no questions to the witness.

Subscribed and sworn to before me this 19th day of October, A. D. 1854.

ALPHEUS FELCH,
Commissioner.

Filed in office Oct. 19th, 1854.
(Signed) Geo. Fisher, Secy.

DEPOSITION OF JUAN JOSE CASTRO.

United States of America,
State of California.—ss.

San Francisco Oct. 19, 1854.

This day came before Peter Lott a Commissioner for taking testimony to be used before the Board of U. S. Land Commissioners in said State, Juan Jose Castro a witness on behalf of the claimants G. W. P. Bissell, and William H. Aspinwall in case No. 307 on the docket of said Board, and said witness being duly sworn deposed in Spanish which is interpreted by the interpreter to said Board as follows:

The U. S. Law Agent is present.

Questions by Judge Sutherland for Claimants.

1st Question.

What is your name, age & place of residence?

Answer.

My name is Juan Jose Castro. My age 52 years. My residence Contra Costa County, California.

2d Question.

Do you know the place called Mare Island. If yea, state what you know of its occupation?

Answer.

I do know the said Island. Victor Castro occupied it in the year 1840 by putting mares and horses on it, and he built a hut there for the Indians in charge of said stock and a corral for the stock. I assisted in putting said mares and horses on the Island.

Cross Examined by U. S. Law Agent.

1st Question.

How many Islands did Gov. Alvarado ever grant to you?

Answer.

Only one, the Island of Yerba Buena.

2d Question.

Are you a brother to Victor Castro the grantee in this case?

Answer.

I am.

3d Question.

How many mares and horses were put on the Island at the time you have mentioned?

Answer.

About 50 head.

4th Question.

Was that before or after the grant was made?

Answer.

It was after the grant in the same year.

5th Question.

Where did you take animals from?

Answer.

From San Pablo.

6th Question.

Which Island was granted first Yerba Buena or Mare Island?

Answer.

The Island of Yerba Buena was first granted.

7th Question.

How do you know?

Answer.

Because it was granted to me.

8th Question.

Were both grants made at the same place?

Answer.

I came here to give testimony concerning Mare Island and when that is done you can ask concerning the other.

9th Question.

How did you take the mares from San Pablo to Mare Island and who was with you?

Answer.

We drove them to the Straits and then took them over in boats to the Island. There were some Mexican and Indian servants with me. 3 Mexicans and 4 or 5 Indians.

The Mexicans were Manuel Andres, Mariano and Olvera, and I do not know the names of the Indians. Victor Castro was along with us.

10th Question.

How long were you taking the mares to the Island?

Answer.

We were 3 or 4 hours going from San Pablo to the Straits, and we were 2 days putting them on the Island.

11th Question.

How long did you all stay on the Island after you got the stock all over?

Answer.

Victor and myself went away after it was all done and we left the Indians there to take care of the stock.

12th Question.

What time in 1840 was this done.

Answer.

I do not remember what month it was, though I think it was in October or November. The rainy season had commenced.

13th Question.

When were you next at the Island and how long?

Answer.

I was there in the following year in June. We were there but a short time. We just went there to get some horses to ride.

14th Question.

Who went with you?

Answer.

Victor Castro the grantee in this case.

15th Question.

When were you next there?

Answer.

I have not been there since.

16th Question.

To what place did you ride the horses you took from the Island in 1841 and how long did you stay?

Answer.

We went to Sascal to land the horses there. We were there 3 or 4 days.

17th Question.

Where did you go then?

Answer.

We went and left the horses on the Island, and then we went to San Pablo.

18th Question.

On what part of the Island was the corral built?

Answer.

It was on the left hand side of the Island as you enter the Straits going to Napa.

19th Question.

How many tame horses were there among those on the Island?

Answer.

Some 10 or 12.

Re-examined by Claimants Counsel.

1st Question.

When you say that the horses were placed on the Island after the grant, state what grant you mean?

Answer.

I mean the first provisional concession by Jimeno.

Juan Jose Castro.

Subscribed and sworn to before me on this 19th day of October A. D. 1854.

Peter Lott Comr. & C.

Filed in office Oct. 20th, 1854.

(Signed) Geo. Fisher, Secy.

DEPOSITION OF WILLIAM McDANIEL.

United States Land Commission

San Francisco, Nov. 1, 1854.

On this day before Commissioner R. Aug. Thompson came William McDaniel a witness on behalf of the United States in Case No. 307 in which case G. W. P. Bissell et al. are claimants who after being duly sworn deposed as follows:

Present U. S. Law Agent & Mr. Halleck for claimants.

Witness states that his name is William McDaniel, his age fifty four years and residence Solano County California.

Question by Law Agent.

Are you acquainted with the place called Mare Island. If yea, state what you know in relation to the grant of said Island and of the document filed in this case as evidence of title marked Exhibit 1 to Depo. of S. Cooper P. L.

Answer.

I can only state that in the spring of 1850 Stephen Cooper showed me a paper purporting to be a permit to one Castro to pasture mares and colts on the Island. Said document was I think in the Spanish language and was translated to me by Mr. Misner, or it might have been a written translation of the document.

Mr. Cooper presented said papers to me in order to obtain my opinion as to whether it was sufficient to prevent his taking a preemption on said Island.

In reply I informed him that I did not think it offered any obsticle to such preemption.

Some time afterwards in the spring or early in the summer said Cooper informed me that Mr. Frisbee had brought the same paper back with a grant upon the back of it and prohibited him from selling in or occupying said Island.

I did not see the papers at that time. Nor am I able to state that the document referred to in the question is the same paper.

(The latter clause of this answer objected to by claimants Atty. on the ground that it is hearsay)

William McDaniel

Subscribed and sworn to before me Nov. 1st, 1854.

R. Aug Thompson, Comr.

Filed in office Nov. 1st, 1854.

(Signed) Geo. Fisher, Secy.

DEPOSITION OF L. B. MIZNER

San Francisco Nov. 4th 1854.

On this day before Commissioner S. B. Farwell personally came L. B. Mizner a witness on behalf of the Government in case No. 307 and after being duly sworn deposed as follows:

1st Question.

What is your name, age and place of residence?

Answer.

My name is L. B. Mizner, age twenty seven years, residence Benicia.

2d Quesiton.

Are you acquainted with the original grant from Gov. Jimeno and Juan B. Alvarado to Victor Castro marked Exhibit 1 attached to the deposition of

S. Cooper—if yea state all you know in regard thereto?

Answer.

I saw the paper in the year 1850 and interpreted the same to Major Stephen Cooper. So much as is on the first page which purports a permit to pasture horses on the Island. As to what is contained on the back I had no recollection whether it was there or not which purports to be a grant from Gov. Alvarado.

3d Question.

What is your impression as to the second grant being on the paper at the time you examined the same?

Answer.

My impressions are that the second grant was not on the paper at the time I examined the paper, but don't know whether I got the impressions from the inspection of the paper at the time or from what has since been said to me in reference to the matter by Dr. Simple and Major Cooper. Dr. Simple is now dead.

Questions by Claimants Counsel.

1st Question.

What time in the year 1850 was it that you saw the paper?

Answer.

I am not able to state, don't know that I could say within twelve months of the time.

2d Question.

What means have you of knowing this to be the same paper that was shown you at the time?

Answer.

Nothing only from my recollection of its appearance and contents. I do not know the handwriting in which it is written.

L. B. Mizner

Sworn to and subscribed before me on 4th Nov. A. D. 1854.

S. B. Farwell, Comr.

Filed in office Nov. 4th, 1854.

Geo. Fisher, Secy.

Office of the Surveyor General of the United States for California.

John C. Hays, Surveyor General of the United States for the State of California and as such now having in my office and in my charge and custody a portion of the archives of the former Spanish and Mexican Territory or Department of Upper California, by virtue of the power vested in me by law, do hereby certify that the three preceding and hereunto annexed pages of tracing paper numbered from one to three inclusive exhibit a true and accurate copy of a document now on file and forming a part of the said archives in this office.

In testimony whereof, I have hereunto signed my name officially and caused my seal of office to be affixed at the City of San Francisco this twenty ninth day of September, 1853.

John C. Hays

U. S. Surveyor Gl. California.

Filed in office Jany. 19, 1854.

Geo. Fisher, Secy.

TRANSLATION OF EXPEDIENT.

Stamp Third. Two Reales.

Provisionally authorized by the Maritime Custom House of the Port of Monterey in the Department of the Californias for the years 1840 and 1841 Alvarado.

ANTONIO MARIA OSIO.

(Custom House Stamp)

Senor Prefect of the 1st District

Jose Victor Castro a native of and resident in this Department before the known justification of Your Excellency as is proper and lawful presents himself and represents.

That it being well known that we generally every year receive injuries from the Indians by robberies, etc. and as I have no secure place to put my little stock, I am under the necessity of coming to the goodness of Your Excellency and as there is an adjacent Island in the Bay of San Francisco called "Mare Island" which has no owner, of asking that it may be granted to me for depositing my said stock where it will be safe from the injuries which happen from said Indians.

I know Senor that it will make me some expence to pass over to said Island my small property but I will do it and with pleasure in order to secure what little remains to me.

Wherefore I beg and pray that you will be so good as to decree in favor of the Petitioner [illegible] etc.

Monterey, October 30th, 1840.

JOSE VICTOR CASTRO.

(In the Margin)

San Juan de Castro,
October 30, 1840.

Pass this Petition to the Justice of the Peace of the Contra Costa for report of the said adjacent Island which Citizen Victor Castro asks for is vacant and if it can be granted and this being done return it for decision.

CASTRO.

In virtue of the Superior decreto which precedes of Senor Prefect Don Jose Castro which you have been so good as to send to me on the petition for the Island called "de la Yegua" I ought to say that said Island belongs rather to the Coast of San Solano than to that of San Pablo, and that to the present time it is vacant and this authority does not know as any citizen has ever pretended to it, this is what I ought to say in compliance with what is asked of me.

God and Liberty. Rancho of San Antonio, November 4th, 1840.

GRACIA PERALTA.

Most Excellent Senor Governor:

Having seen the contents of this petition and the Report of the Justice of the Peace of Contra Costa and all else presented the Prefecture reports that the petitioner possesses the legal requisits to entitle him to be attended to and that the Island asked for call "La Yegua", (Mare Island) is vacant and with-

out any person pretending to it, leaving the matter to your Excellency's pleasure.

San Juan Bautista, Nov. 14th, 1840.

JOSE F. CASTRO.

Filed in office Jan 19, 1854.

(Signed) GEO. FISHER,
Secy.

TRANSLATION OF TITLE.

Manuel Jimeno Casarin, Governor ad interim of the Department of the Californias:

[(Seal) Civil Govt. of Upper California.]

Don Victor Castro is provisionally permitted while the usual steps are being to taken, to occupy with horses the Island named "La Yegu" in the Straits of Carquenez.

In consequence let this permission be delivered to the party interested for his security.

Monterey, Oct. 31, 1840.

(Signed) JIMENO.

(Signed) Jose Z. Fernandez, Sec. ad interim

Juan B. Alvarado, regular Constitutional Governor of the Department of the Californias:

Whereas, Don Victor Castro, a Mexican by birth, has petitioned to this Government for the ownership of the Island named "La Yegu" situated in the neighborhood of the Straits of Carquinez in consequence of which the foregoing permission was granted him by Senor Don Manuel Jimeno Casarin, for the time being, in charge of this Government,

and in virtue of which the petitioner has repeated again his petition, proving that said Island does not belong to the ownership of any individual, corporation, Pueblo, I have in decree of this day declared as I do by these presents declare Don Victor Castro owner in fee of the said Island in all its extent conformably with the powers conferred on me by the Supreme National Government. In consequence let this be delivered to the party interested, that it may serve him for a title, and for such other purposes as may be convenient.

Given in Monterey Capital of the Department on the second day of the month of May.

(Signed) Juan B. Alvarado

Filed in office Aug. 31st, 1852.

Geo. Fisher, Secy.

Recorded in Ev. B Vol. 17, p. 606.

Geo. Fisher, Secy.

DEED FROM CASTRO TO B. SIMMONS & J. B. FRISBEE.

Know all men by these Presents.

That I Victor Castro and Loiza Martinez his wife of Contra Costa in the State of California, for and in consideration of seven thousand five hundred dollars to us paid by John B. Frisbee of Benicia and Bezer Simmons of San Francisco in said California the receipt whereof is hereby acknowledged have bargained and sold and by these presents do grant and convey unto the said John B. Frisbee and Bezer Simmons their heirs and assigns

all that tract of land lying and being in said California and described as follows viz. Being that tract of land situated near the Straits of Carquinez in the Bay of San Francisco and at the mouth of Napa Creek, the said Creek bounding it to the Northward, the said tract of land being known as "Isla de la Yegua" or Mare Island being the same land granted to me the said Castro on the twentieth day of May A. D. 1841 by Juan B. Alvarado Governor of California, the original grant being refered to made a part of this deed and herewith transferred to the said Frisbee and Simmons.

To Have and to Hold the said discribed and conveyed premises with all the appertiances unto the said John B. Frisbee and the said Bezer Simmons their heirs and assigns to them and their own use & behoof forever.

And I the said Victor Castro for myself, my heirs executors and administrators covenant hereby to and with the said John B. Frisbee and the said Bezer Simmons their heirs executors administrators & assigns that I am lawfully seized in fee of the afore granted premises, that they are free from all encumbrances, that I have good right to sell and convey the same to the said John B. Frisbee and Bezer Simmons as aforesaid, and that I will, and my heirs executors and administrators shall warrent and defend the same to the said John B. Frisbie and the said Bezer Simmons their heirs and assigns against the lawful claims and demands of all persons.

And for the consideration aforesaid and for divers other good and valuable considerations I Luiza Martinez wife as aforesaid of the said Victor Castro, I do hereby release and quit claim unto the said John B. Frisbee and Bezer Simmons their heirs and assigns all my right claim or passability of dower or other interest in or out of the afore-discribed premises.

In Witness Whereof we the said Victor Castro and Loisa Martinez his wife hereunto set our hands and seals this twenty eighth day of May A. D. eighteen hundred and fifty.

(Signed) Victor Castro

Executed and delivered in presence of
(the word "grant" being first interlined)
Witnesses to Victor Castro
Von Pruden.
Witness O. Livermore

State of California,
County of San Francisco.

At San Francisco this twenty eighth day of May A. D. eighteen hundred and fifty before me personally appeared Victor Castro known to me as the person executing the foregoing instrument and acknowledged the same to be his free act and deed.

Before me

[Seal] Edw. McGowan J. P.

Filed in office Sept. 10, 1853.

(Signed) Geo. Fisher, Secy.

DEED. FRISBEE TO ASPINWALL.

Know all men by these Presents

That I John B. Frisbee of Benicia in the State of California for and in consideration of five thousand dollars to me paid by William H. Aspinwall of New York the receipt whereof is hereby acknowledged have granted, bargained, sold, released and conveyed, and by these presents do grant, bargain, sell, release and convey unto the said William H. Aspinwall his heirs and assigns one half of all my right, title, interest & Estate in and to that tract of land situated near the Straits of Carquinas in the Bay of San Francisco and at the mouth of Napa Creek, the said Creek bounding it on the Northward the said tract of land being known as "Isla de la Yegua" or Mare Island being the same tract of land granted by Juan B. Alvarado Gov. of California to Victor Castro by grant or patent dated the twentieth day of May, A. D. 1841, and by said Castro conveyed to said John B. Frisbie and Bezer Simmons on the twenty eighth day of May A. D. 1850—meaning hereby to convey to said William H. Aspinwall his heirs and assigns one quarter part of the whole of said Island excepting from the whole of said Island the one tenth part and the one sixteenth part of which have heretofore been conveyed by said Frisbee and Simmons to Victor Castro and William P. McArthur with all the privileges and appertenances thereto belonging.

To Have and to Hold the said discribed and conveyed premises to said William H. Aspinwall his heirs and assigns, that I am lawfully seized in fee

of the aforesaid premises, and that they are free from all encumbrances, that I have good right to sell and convey the same to the said William H. Aspinwall as aforesaid and that I will, and my heirs executors and administrators shall warrent and defend the same to the said William H. Aspinwall his heirs and assigns forever against the lawful claims and demands of all persons.

In Witness Whereof the said John B. Frisbee have hereunto set my hand and seal this fifteenth day of August A. D. 1850.

John B. Frisbee.

Signed, Sealed and delivered in presence of
H. M. Halleck
John B. Peachy.

State of California,
County of San Francisco.—ss.

On this 15th day of August A. D. 1850 before me Thomas Tilder a Notary Public duly commissioned for the County aforesaid personally appeared John B. Frisbee to me known to be the person discribed in and who executed the within and foregoing deed and acknowledged that he executed the same of his own free act and deed for the purposes therein set forth.

Given under my hand and seal the day and year last above written.

[Seal] Thomas Tilder
Notary Public

Filed in office Oct. 19, 1854.
(Signed) Geo. Fisher, Secy.

DEED. CASTRO TO BISSELL.

Know all men by these presents that I Victor Castro of the township of Contra Costa and County of Contra Costa in the State of California for and in consideration of the sum of eighteen hundred dollars to me in hand paid by George W. P. Bissell of the City of San Francisco and the State aforesaid at or before the execution and delivery hereof the receipt whereof I do hereby acknowledge, have granted, bargained, sold and conveyed and by these presents do grant, bargain, sell and convey unto the said Geo. W. P. Bissell his heirs and assigns forever all my right, title and interest in and to the one undivided tenth part (1/10th) of the tract of land situated in the State of California near the Straits of Carquinas in the Bay of San Francisco at the mouth of Napa Creek, the said Creek bounding the said tract to the Northward which said tract of land is called "Isla de la Yegua" or Mare Island, and being the same tract of land originally granted to said Castro by Juan B. Alvarado Gov. of California by grant bearing date the 20th day of May A. D. 1841 and by the said Castro conveyed to John B. Frisbee and Bezer Simmons by deed bearing date the 28th day of May A. D. 1850, and the above one tenth part of said land reconveyed by the said Frisbee & Simmons to the said Castro by deed bearing date the 28th day of May A. D. 1850.

To Have and to Hold the said one undivided tenth part with all the appurtenances unto the said Geo. W. P. Bissell his heirs and assigns to his and their

own use and behoof forever. And I the said Victor Castro for myself and my heirs, executors and administrators do covenant to and with the said George W. P. Bissell his heirs and assigns that I am lawfully seized in fee of the afore granted premises that they are free from all encumbrances that I have good right to sell and convey the same to the said Geo. W. P. Bissell as aforesaid and that I will and my heirs, executors and administrators shall warrent and defend the same to the said Geo. W. P. Bissell his heirs and assigns against the lawful claims and demands of all persons, and failing so to do I the said Victor Castro for myself and my heirs, executors and administrators do covenant with the said Geo. W. P. Bissell his heirs and assigns that I will and my heirs, executors and administrators shall be held in damages to the said Geo. W. P. Bissell his heirs and assigns in such sum as the said Geo. W. P. Bissell his heirs and assigns may sustain not exceeding the sums mentioned in the consideration of these presents.

In Witness Whereof I the said Victor Castro have hereunto set my hand and seal this twentieth day of July in the year of our Lord one thousand eight hundred and fifty two.

[Seal] Victor Castro

Signed, Sealed and delivered in presence of

Chas. H. H. Cook.

S. W. Moore.

State of California,
City and County of San Francisco.—ss.

On this 20th day of July A. D. 1852 before me a Notary Public in and for the City and County of San Francisco, State aforesaid, personally appeared Don Victor Castro to me well known to be the person described in and who executed the foregoing conveyance and acknowledged that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In Testimony Whereof I have hereunto set my hand and affixed my official seal the day and year last aforesaid.

[Seal] Samuel W. Moore
Notary Public

Filed in office Oct. 20, 1854.
(Signed) Geo. Fisher, Secy.

DEED, FRISBIE AND SIMMONS TO V. CASTRO.

Know all men by these presents that we John B. Frisbie of Benicia and Bezer Simmons of San Francisco of California for and in consideration of Ten thousand dollars to me paid by Don Victor Castro of Contra Costa in said California the receipt whereof is hereby acknowledged have bargained and sold and by these presents do grant and convey unto the said Castro, his heirs and assigns, one undivided tenth part (1/10) of the tract of land situated in

California near the Straits of Carquinas in the Bay of San Francisco at the mouth of Napa Creek the said Creek bounding the said tract to the northward which said tract of land is called "Isla de la Yegua" or Mare Island and the same tract of land this day conveyed by said Castro to said Frisbie and said Simmons it having been originally decreed to said Castro by grant from Juan B. Alvarado, Gov. of California, dated the 20th day of May, A. D. 1841.

To Have and to Hold the said one undivided tenth part with all the appurtenances unto the said Victor Castro, his heirs and assigns to his and their own use and behoof forever.

And we the said John B. Frisbie and Bezer Simmons for ourselves and our heirs, executors and administrators, covenant to and with the said Castro his heirs and assigns that we are lawfully seized in fee of the aforegranted premises that they are free from all incumbrances that we have good right to sell and convey the same to the said Castro aforesaid and that we will and our heirs, executors and administrators shall warrant and defend the same to the said Castro, his heirs and assigns against the lawful claims of all persons whatever.

In Witness Whereof I, John B. Frisbie and I, Bezer Simmons acting by my attorney in fact Frederick Billings duly authorized by power of attorney dated December 26 A. D. 1847 recorded in archives of San Francisco Book M of Deeds, page 70, hereto set our hands and affix our seals at San Francisco

this twenty-eighth day of May the year Eighteen hundred and fifty at San Francisco.

[Seal] John B. Frisbee,

[Seal] Bezer Simmons,
by his attorney in fact
Frederick Billings.

Executed and delivered in presence of
Richard C. Peachy,
the word "thousand" interlined, 1st page, fourth written line from top before execution.
Von Pruden.

J. Man'l Allen.

State of California,
County of San Francisco—ss.

On this 21st day of July, A. D. 1852, before me the subscriber a Notary Public in and for said county personally came Frederick Billings known to me to be the person who is the attorney-in-fact of Bezer Simmons executed the within deed and acknowledged to me that he executed the same freely and voluntarily as the act and deed of Bezer Simmons by virtue of a power of attorney for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto subscribed my name and affixed my Notarial Seal the day and year last above written.

[Seal] Royal H. Waller,
Notary Public.

State of California,
County of Sonoma—ss.

On this 28th day of July, A. D. 1852 before me the undersigned County Clerk of Sonoma County personally appeared John B. Frisbie to me known to be the person described in and who executed the foregoing instrument and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and seal of court affixed at office in City of Sonoma this day and year last above written.

[Seal] John H. Brewster,
Deputy Clerk of Sonoma County.

Filed in Office, Oct. 20, 1854.

(Signed) Geo. Fisher, Secy.

DEED. F. BILLINGS, ET AL., ASSIGNEES TO G. W. P. BISSELL.

Know All Men by These Presents, that we, Frederick Billings, James R. Bolton and Henry W. Halleck, all of the City of San Francisco in the State of California, assignees of the real estate and personal property of the late firm of Simmons Hutchinson and Company of the said City of San Francisco, composed of Bezer Simmons and William H. Stowell by virtue of a certain deed duly executed dated the 3d day of September A. D. 1850, recorded in the office of the Recorder of the County of San Francisco in Book No. 1 Deeds of Trust, page 32.

Also assignees of the Real Estate and personal property of the late Bezer Simmons of said San Francisco by virtue of a certain deed duly executed dated the third day of September, A. D. 1852, recorded in the office of the Recorder of the County of San Francisco in Book No. 1, Deeds of Trust, page 29, that we as such assignees and acting under and by virtue of said deeds parties of the first part in consideration of twenty-five hundred dollars to us in hand paid the receipt whereof is hereby acknowledged by George W. P. Bissell of said San Francisco party of the second part have granted, bargained, sold and conveyed and by these presents do grant, bargain, sell and convey unto the said party of the second part his heirs and assigns. All our right, title, interest and claim of in and to the undivided one-half part of Sixty Seven Eightieths (67/80) of Mare Island, so called situated in the Bay of San Pablo which said Island was provisionally granted by Gov. Jimeno on the 31st day of October, A. D. 1840 and afterwards on the 20th day of May, 1841, granted by Governor Alvarado to Victor Castro, and by said Castro conveyed to Frisbie and Simmons on the 28th day of May, 1850 and the interest of said Simmons conveyed to said assignees as aforesaid.

To Have and To Hold the said mentioned premises with all the appurtenances unto the said party of the second part, his heirs and assigns to his and their use and behoof forever.

In Witness Whereof we the parties of the first part hereto set our hands and seals this the first day

of July, the year of our Lord, one thousand eight hundred and fifty-two at San Francisco, aforesaid.

[Seal] Frederick Billings,
Assignee of Bezer Simmons and Assignee of Simmons, Hutchinson & Co.

[Seal] H. W. Halleck,
Assignee of Bezer Simmons and Assignee of Simmons, Hutchinson & Co.

[Seal] James R. Bolton,
Assignee of Bezer Simmons and Assignee of Simmons, Hutchinson & Co.

Executed and delivered in presence of
R. H. Waller.

State of California,
County of San Francisco—ss.

On this 16th day of July, A. D. 1852 personally appeared before me the subscriber, a Notary Public in and for said County, Frederick Billings, H. W. Halleck and James R. Bolton, known to me to be the individuals described in and who as the assignees of Bezer Simmons and of Simmons, Hutchinson & Co., and who executed the foregoing conveyance and severally acknowledged to me that they executed the same as such assignees freely & voluntarily for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed

my name and affixed my Notarial Seal on the day and year last above written.

[Seal] Royal H. Waller,
Notary Public.

Filed in office, Oct. 20, 1854.

(Signed) Geo. Fisher, Secy.

DEED. SIMMONS TO BILLINGS, ET AL.

This Indenture made this third day of September A. D. One Thousand Eight Hundred and Fifty between Bezer Simmons of San Francisco in the State of California, party of the first part and Frederick Billings, James R. Batton and H. W. Halleck of said city, parties of the second part,

Witnesseth that the said party of the first part in consideration of the sum of One Dollar to him in hand paid by the said parties of the second part the receipt whereof is hereby acknowledged and for the further considerations hereinafter specified hath given granted bargained and sold and by these presents do give, grant, bargain and sell unto them the said parties of the second part all those lands, tenements and hereditaments lying and being in the State of California which are more particularly specified and described in a Schedule hereto annexed and made part hereof, marked Schedule "A". To Have and To Hold unto them the said parties of the second part, their heirs and assigns forever. In trust, nevertheless and to and for the following uses, interests and purposes that is to say that the said

parties of the second part shall take possession of all and singular the said lands & tenements hereby conveyed or intended to be conveyed and sell and dispose of the same either at public or private sale to such person or persons for such prices and on such terms and conditions, and either for cash or upon credit as in his judgment may appear best and most for the interest of the parties concerned and convert the same into money and therefore to execute, acknowledge and deliver good and sufficient deeds and instruments of conveyance necessary to effect a sale and transfer of any and all estates and property hereby conveyed or intended so to be, and by and with the proceeds of such sales the said parties of the second part shall first pay and disburse all the just and usual expenses, costs, charges and commissions of making executing and conveying unto full effect this assignment and the objects thereof and the residue of the proceeds of such sales shall be considered as the net avails or proceeds of the property hereby conveyed.

And first by and with the said net proceeds of the said parties of the second part shall pay and discharge in full all the debts, obligations and demands due or to become due by the party of the first part or in any wise existing against him together with all interest which may be due thereon at the time of payment.

And secondly by and with the rest residue and remainder of said net proceeds if any shall remain after the payment in full of said debts and private

liabilities of the party of the first part, the said parties of the second part shall pay and discharge the partnership debts mentioned in the deed of assignment this day made by the said Bezer Simmons and William H. Stowell to the said parties of the second part and hereby referred to according to the order and arrangement established by the said deed for the payment of the debts therein mentioned or referred to.

And the said party of the first part also assigns and conveys to the said parties of the second part all the goods, chattels, vessels, boats and personal property of any kind mentioned in the said Schedule "A" hereto annexed in which for the uses and purposes herein set forth as those to which the proceeds of the Real Estate above conveyed are to be devoted.

In testimony whereof the party of the first part hath hereunto set his hand and affixed his seal on the day and year first herein written.

Bezer Simmons.

Signed, sealed and delivered in presence of

Richard C. Peachy,

C. Temple Emmett.

State of California,

County of San Francisco.—ss.

At San Francisco on this the third day of September A. D. 1850 personally appeared before me a Notary Public in and for said County Bezer Simmons well known to me to be the party described in and who executed the foregoing instrument and acknowledged that he executed the same freely and

voluntarily and for the purposes therein mentioned.

In Witness Whereof I have hereunto set my hand and official seal the day and year above written.

[Seal] C. Temple Emmett
Notary Public

SCHEDULE "A"

Schedule of property belonging to Bezer Simmons referred to in his deed of assignment.

The Rancho known as Novato Rancho in Marin County purchased of Jacob P. Luse and Rosalia Vallejo his wife November 24, 1846, save a small portion heretofore conveyed to Benjamin Franklin Simmons with the improvements and my stock thereon.

Seven sixteenths of the Peninsula forming an area of the Bay of San Diego, purchased of—

The following property in the City of San Francisco.

One undivided half of one hundred vara lot numbered eighty eight. Forty varas by fifty varas of fifty vara lot numbered two hundred and eighty five.

Western half of fifty vara lot numbered two hundred and three. Southern half of lot numbered thirty eight fifty vara lot.

About one hundred and forty five lots in Sacramento City the exact number and locality of the same can be ascertained by the original deeds of John A. Sutter to said Simmons dated November 24th A. D. 1849, and recorded in Sacramento and

certain deeds of the lots so conveyed by Sutter given by me to Betheul Phelps, Isaac Y. Matt, Alice Farnham, Franklin N. Billings and Mrs. Ann S. Kegler.

The following property in the City of Benicia viz. The Western half of Lot One (1) in block (5). Lot Six (6) in block Twenty Six. Lot Sixteen (16) in block Forty Seven. Lot Fourteen (14) in Block Forty Eight. Lot Six in block Fifty. Lot Sixteen in Block Fifty One. Lot Sixteen in block Fifty Three.

One undivided fourth part of the ship Magnolia.

A note for two thousand dollars signed by John F. Pope.

Recorded in Co. Recorders office Sept. 4th 1850 10 A. M. in Book No. 1 of deeds of trust p. 29.

John A. McGlynn,
County Recorder
By James O'Grady, Deputy

Filed in office Nov. 7th, 1854.
(Signed) Geo. Fisher, Secy.

DEED.

SIMMONS & STOWELL TO BILLINGS, ET AL.

This Indenture made this third day of September in the year one thousand eight hundred and fifty between Bezer Simmons and William H. Stowell copartners in trade and business under the name firm and style of Simmons Hutchinson & Co. of the first part and Frederick Billings, James

R. Bolton and H. W. Halleck, of the City of San Francisco parties of the second part,

Witnesseth.

That whereas the said copartnership is jointly indebted in sundry considerable sums of money and by reason of severe losses which have recently attended its business operations has become unable to pay and discharge all its liabilities with punctuality in full, and the said parties of the first part are now desirous of making a fair and just distribution of their property and effects among their creditors.

Now therefore this Indenture Witnesseth that said parties of the first part in consideration of the premises and the sum of one dollar to each of them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged have granted, bargained and sold, released, assigned transferred and set over and by these presents do grant, bargain, sell, release, assign, transfer and set over unto the said parties of the second part and to their heirs and assigns forever all and singular the lands, tenements and hereditaments situate, lying and being within the State of California also all the goods, chattles, steamboats, merchandize, bills, bonds, notes, book accounts, claims, demands, choses in action, books of account, evidences of debt and property of every name, nature and description whatever and wheresoever of the said Bezer Simmons and William H. Stowell the parties of the first part more particularly enumerated and described in the schedule hereto annexed marked "A" and made part of this Indenture.

To Have and to Hold the same and every part and parcel thereof with the appurtenances to the said parties of the second part their heirs and assigns forever.

In trust nevertheless and to and for the following uses, intents and purposes that is to say the said parties of the second part shall take possession of all and singular the lands, tenements and hereditaments and all other property hereby assigned or intended so to be, and sell and dispose of the same either at public or private sale to such person or persons for such prices and on such terms and conditions and either for cash or upon credit as in their judgment may appear best and most for the interest of the parties concerned, and covenant the same unto money, and also to collect all and singular the said debts, dues, bills, bonds, notes, accounts, claims, demands, and choses in action, or so much thereof as may prove collectable and therefore to execute, acknowledge and deliver good and sufficient deeds, bills of sale, releases and all other instruments of conveyance that may be necessary and proper to effect a sale and transfer of any and all the estates, property and effects hereby conveyed or intended so to be and by deed with the proceeds of such sales and collections the said parties of the second part shall first pay and disburse all the just, reasonable and usual expenses, costs, charges and commissions of making and conveying into effect this assignment and the objects thereof and the residue of the proceeds of such sales and collections shall be considered as the nett avails or

proceeds of the property and effects hereby assigned.

And first by and with the said proceeds the said parties of the second part shall pay and discharge in full the following sums of money to the persons to whom they are respectively due, that is to say George H. Howard three thousand dollars ($3000) to Flint Peabody & Co. three thousand dollars ($3000) to Wells & Co. two thousand dollars ($2000) wtih legal interest from the date of this assignment.

The said debts are mentioned in Schedule "B".

And secondly by and with the residue and remainder of said nett proceeds if any shall remain after the payment in full of the debts and liabilities mentioned in Schedule "B" the said parties of the second part shall pay and discharge all sums of money due upon deposit made with the firm of Simmons Hutchinson & Co. when said firm was composed of Bezer Simmons, William H. Stowell, John F. Pope and Titus Hutchinson as well as when composed of the said parties of the first part provided that said deposits were made without arrangement between the depositors and the said firm of Simmons Hutchinson & Co. that the money or gold dust deposited should bear interest, and also whatever sums of money shall be due or become due to the owner of the Steamer Gold Hunter. The above mentioned debts which are set forth in Schedule "C" shall be paid in full if such remainder shall prove sufficient for that purchase and if insufficient then the parties of the second part shall apply such remainder to the payment and liquidation of said debts and demands mentioned in Schedule "C" pro

rata share and share alike according to their respective amounts as far as such remainder will *satnd* for that purpose and in the foregoing class of creditors shall be included the firm of G. S. Robbins & Son of the City of New York Bankers the amounts of indebtedness to whom is stated in said Schedule "C".

And thirdly by and with the rest, residue and remainder of said nett proceeds if any shall remain, after paying & discharging the debts and demands aforesaid the said parties of the second part shall pay & discharge all the other copartnership debts demands and liabilities whatsoever now existing whether due or hereafter to become due against the firm of Simmons Hutchinson & Co. when composed of the said Bezer Simmons, Titus Hutchinson, John F. Pope and William H. Stowell partners as well as when the said firm was composed of the parties of the first part partners therein provided such remainder shall prove sufficient for that purpose and if insufficient then said parties of the second part shall apply such remainder to the payment and liquidation of such debts & demands pro rata share and share alike according to their respective amounts as far as such remainder will extend for that purpose.

And lastly the said parties of the second part shall return the surplus if any remain after paying the debts and demands aforesaid to the said parties of the first part their executors, administrators or assigns and for the better execution of these pres-

ents and of the several trusts hereby reposed the said parties of the first part do hereby make, nominate, constitute and appoint the said Frederick Billings their and each of their true and lawful attorney irrevocable with power of substitution and revocation with full power and authority in the name of the said parties of the first part and their and each of their legal representatives or otherwise to do, transact and perform all acts, deeds, matters and things in the full execution of these powers.

And the said parties of the first part for themselves and their and each of their heirs, executors and administrators covenant and agree to and with the said parties of the second part that they will when requested make or cause to be made such further assignments, deeds and conveyances as shall be necessary to carry into full and complete effect the intentions of the parties to these presents.

It is understood that this deed of assignment is a deed of trust for the lawful benefit of the creditors of the present firm of Simmons Hutchinson & Co. composed of the parties of the first part and also the creditors of the firm of Simmons Hutchinson & Co. as it was formaly constituted when Titus Hutchinson and John F. Pope were also partners aside from the preference hereinbefore given to certain creditors, the creditors of the two firms doing business under the same name being treated alike.

In testimony whereof the parties to the first part have hereunto set their hands and affixed their seals

on this third day of September A. D. one thousand eight hundred and fifty.

Bezer Simmons.
W. H. Stowell.

Signed, Sealed and delivered in the presence of the words "creditors of the" having been interlined on the last line of the fifth page before the execution hereof.

Richard C. Peachy
C. Temple Emmett.

State of California,
County of San Francisco.—ss.

At San Francisco on this the third day of September A. D. eighteen hundred and fifty personally appeared before me a Notary Public within and for said County Bezer Simmons and William H. Stowell well known to me to be the parties described in and who executed the foregoing instrument, and each acknowledged that he executed the same freely and voluntarily and for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and seal affixed the day and year above written.

[Seal] C. Temple Emmett
Notary Public

SCHEDULE "A"

Property belonging to Simmons Hutchinson and Company being Schedule "A" referred to in the foregoing deed of assignment.

Beach and Water Lot No. One hundred and twenty one with store thereon situated on Clay

Street between Montgomery and Sansome, mortgaged to Wells & Co. to secure the payment of a note for fifteen thousand dollars.

Three Fifteenths (3/15) of Steamer Gold Hunter mortgaged to Wells & Co. to secure the payment of a note for Twenty five thousand dollars.

Ten twenty-fourths (10/24) of Steamer McKim mortgaged to Wells & Co. to secure the payment of a note for Fifteen thousand dollars.

One undivided half of twenty lots bought of Dr. B. F. Edwards and situated on Chestnut, Jones and Greenwich Streets on the North Beach.

Lot on Front Street, Sacramento City, between "M and N" twenty-five feet front and one hundred and sixty feet deep to an ally with the store thereon.

One undivided half of Sixty-seven Eightieths (67/80) of Mare Island in San Pablo Bay.

Lot on M Street in Vernon with store thereon, said lot being twenty five feet front and one hundred twenty-five deep.

About Eight hundred lots in Vernon and an individual interest in the lands adjoining the town.

One undivided sixth part of the Rancho known as Llano Seco on the Sacramento River.

One half of Steamboat building by Watters Butcher & Co. at Rincon Point.

One Eighteenth of Steamer Hartford and one eighteenth of her dividens since July 1st.

Three Eighths of Steamer Bute.

One third of Bark Whitace.

One fourth of Bark Dinan.

Storeship Florence with Scows, Launches and Boats.

About two hundred thousand feet of lumber on the North Beach.

About one hundred thousand feet of lumber at Alviso.

About thirty thousand feet of lumber at Sacramento City.

About Sixty thousand shingles at do, do.

Counting Room furniture consisting of Desks, Safes, Gold Scales, Stoves, etc.

Lot in Block fifteen in Town of Benicia.

A large amount of Book accounts and notes due the said firm of Simmons Hutchinson & Co., the amount of which will be particularly ascertained by reference to the backs of said notes.

Small amount of merchandize in store.

Recorded in Co. Recorder's office, Sept. 4, 1850 at 10 a. m. in Book No. 1 Deeds of Trust, on page 32.

John A. McGlynn,
County Recorder.
By Jas. O'Grady, Deputy.

Filed in office, Nov. 7, 1854.
(Signed) Geo. Fisher, Secy.

OPINION OF THE BOARD DELIVERED BY COMMISSIONER S. B. FARWELL.

GEORGE W. BISSELL, ET AL.,

vs.

THE UNITED STATES.

For a Place called Mare Island in the Bay of San Francisco in the County of Sonoma.

The claimants in this case ask confirmation of their title which they derive from Victor Castro, by virtue of a grant issued to the said Castro, on the 20th day of May, 1841, by Governor Juan B. Alvarado, and have offered in evidence in support of their claim the original grant to the said Castro, and also various deeds of conveyance from different persons through whom the title has passed from the said Castro showing a correct chain of title from the said Castro of his interest to the present claimant.

Strong suspicion has been raised by the testimony as to the genuineness of the grant.

It is written on the back of the same half sheet that contains a provisional grant to the same party executed by Manuel Jimeno, acting as Governor on the 31st day of October, 1840. And it would seem from inspection of the document that it would be highly impossible that any person whose attention was drawn to the inspection of the document and examine the contents of the first and provisional grant without noticing the contents of the second page, as it is written in quite a heavy hand and shows quite plainly through the paper. Mr. Misner, a witness on the part of the government, testifies that a docu-

ment similar to the provisional grant now under consideration and in his opinion the same one, was handed to him sometime in the year 1850 to be translated with the view of getting advice as to the legal effect, and he says that he translated that part of the document, and did not observe anything that now appears on the other side of the paper.

Stephen Cooper swears that sometime in 1850 he saw a similar paper, which was shown to him by Mr. Frisbie, one of the then claimants of the Island in order to show witness that he, Frisbie, had a title to the Island, and he said to Mr. Frisbie, "It was strange that this writing appears here now, and it was not here in the winter of 1847 and 1848." And says that he does not know whether he formed his impressions that the grant was attached after 1848, by former inspection of the documents or from hearsay.

Mr. McDonald's testimony is similar to that of Mr. Cooper.

There is no doubt but that the body of the grant on the second page is in the hand writing of Governor Alvarado, and that his signature thereto is genuine.

The only question is as to the time the same was made and executed.

Governor Alvarado as a witness in the case, and swears positively that he wrote the grant and signed it himself at the time and place that it purports to have been done.

The testimony on the part of the government is of a negative nature, while that of Governor Alva-

o is positive and of course under the rule of law
onstructing testimony when the witness in other
ects stands unimpeached he must receive greater
ght when he affirms facts of a positive nature,
in which he could not be mistaken.

the present case Governor Alvarado could not
istaken as to the facts that he has sworn to. He
r did execute the grant officially as Governor
he time it purports to have been done, or he
nitted a forgery in the subsequent execution
eof and perjury in swearing to the time and
e of its execution, for the case presents a state
cts in which Governor Alvarado could not well
istaken, and, from the facts before us we do
eel warranted in discrediting entirely the tes-
ny of Governor Alvarado, and if any force is
to it, it must be for the full extent of his state-
s, and in that event, this claim must be con-
d and a decree herein will be entered accord-

ed in office, May 8, 1855.

(Signed) Geo. Fisher, Secy.

RGE W. BISSEL, ET AL.,

vs.

UNITED STATES.

DECREE OF CONFIRMATION.

this case after having the proofs and allega-
it is adjudged by the Commission that the
of the said petitioners is valid, and it is there-

fore deemed that their application for a confirmation thereof be allowed.

The place of which confirmation is hereby given is situate in the Bay of San Francisco and is called "Isla de la Yegua" or Mare Island and being an Island is bounded by the water's edge.

R. Aug Thompson,
S. B. Farwell,
Commissioners.

Filed in office, May 8, 1855.
(Signed) Geo. Fisher, Secy.

ORDER.

And it appearing to the satisfaction of this Board that the land hereby adjudicated is situated in the Northern District of California, it is hereby ordered that two transcripts of the proceedings and of the decisions in this case, and of the papers and evidence upon which the same are founded be made out and duly certified by the Secretary, one of which transcripts shall be filed with the clerk of the United States District Court for the Northern District of California and the other be transmitted to the Attorney General of the United States.

Office of the Board of Commissioners,
To ascertain and settle the Private Land Claims
in the State of California

I, George Fisher, Secretary to the Board of Commissioners to ascertain and settle the Private Land Claims in the State of California, do hereby certify the foregoing sixty-nine pages, numbered

om 1 to 69, both inclusive, to contain a true, cor-
ct and full Transcript of the Record of the Pro-
edings and of the Decision of the said Board, of
e Documentary Evidence and of the Testimony of
e Witnesses, upon which the same is founded, on
e in this Office, in Case No. 307 on the Docket of
e said Board, wherein G. W. P. Bissel & Wil-
m H. Aspinwall are the Claimants against the
nited States, for the place known by the name of
'sla de Yegua" or Mare Island.

In Testimony Whereof, I hereunto set my hand
d affix my private Seal (not having a Seal of
fice) at San Francisco, California, this twentieth
y of October A. D. 1855, and of the Independence
the United States of America the eighty.

[Seal] GEO. FISHER, Secy.

Office of the Board of Commissioners,
To ascertain and settle the Private Land Claims
the State of California

San Francisco, Oct. 20th, 1855.

A. Monroe Esq.
erk of the U. S. District Court for the Northern
District of California.

;

herewith transmit you, pursuant to the require-
nts of the Act of Congress, approved August 31st,
2, a Transcript of the Record of the Proceed-
s and of the Decision of this Board, of the Docu-
ntary Evidence and of the Testimony of the
nesses upon which the same is founded, in Case

No. 307 on the Docket of the said Board, wherein G. W. P. Bissel & William H. Aspinwall are the Claimants against the United States, for the place known by the name of "Ysla de Yegua" or "Mare Island," and request your receipt for the same.

I am, Respectfully,

Your Ob't Servant,

Geo. Fisher, (Sec.)

Office of the Attorney General of the United States,
Washington, 3 December, 1855.

307 "Ysla de la Yegua," or "Mare Island" G. W. P. Bissell & William H. Aspinwall Claimants.

You will please take notice that in the above case, decided by the Commissioners to ascertain and settle private land claims in the State of California in favor of the claimant, and a transcript of the proceedings in which was received in this office on the 20 day of November, 1855, the appeal in the district court of the United States for the Northern district of California will be prosecuted by the United States.

C. Anthony
Attorney General.

[Endorsed]: Filed Febry. 1, 1856.

No. 311

In the United States District Court for the Northern District of California.

Transcript No. 307
Mare Island

THE UNITED STATES,

Appellants,

vs.

G. W. P. BISSELL & WM. H. ASPINWALL,

Appellees.

George W. P. Bissell and William H. Aspinwall, appellees, appear by their attorneys, and for answer to the petition of the United States filed herein, say:

That their title to the tract of land called "Ysla de la Yegua" (Mare Island), as set forth and described in their petition to the Board of Commissioners and in the documentary and other evidence filed in this case is a good and valid title; that the land claimed is situate in the Northern Dist. of California and within the jurisdiction of this court.

And they pray this Honorable court to affirm the decision of the Board of Commissioners, and to decree their title to be valid.

Halleck, Peachy & Billings
Attys. for Appellees.

[Endorsed]: Filed Feby. 18, '56.

To the Honorable District Court of the United States in and for the Northern District of California.

No. 311

THE UNITED STATES,

Appellants,

vs.

G. W. P. BISSELL and
WILLIAM H. ASPINWALL.

The Petition of the United States, by their Attorney represents: that this cause is an application for a review of the decision of the Board of Commissioners whereby the claim of the said Appellees was confirmed as appears by reference to the records in the case: That a transcript of the said Records was filed in this Court on the 1st day of May, 1855; that a notice of appeal was filed on the 1st day of Aug. 1855 and that the land claimed lies in the said District. That the said claim is invalid.

Wherefore Appellants pray that the said decision of the Board be reversed & that this court decree the said title to be invalid.

Respectfully &c
S. W. Inze
U. S. Dist. Atty.

[Endorsed]: Filed Feby. 18th, '56.

No. 311.

In the United States District Court in and for the Northern District of California.

Transcript No. 307. Mare Island.

THE UNITED STATES,

Appellants,

vs.

G. W. P. BISSELL and W. H. ASPINWALL,

Appellees.

Stated Term of the Court, March 2d, 1857. Hon. Ogden Hoffman, Judge.

On appeal from the final decision of the Board of Commissioners to ascertain and settle Private Land claims in the State of California.

DECREE.

This cause came on to be heard at a stated term of the Court on appeal from the final decision of the Board of Commissioners to ascertain and settle the Private Land Claims in the State of California under the Act of Congress approved on the 3d of March A. D. 1851, rejecting the claim.

Upon the Transcript of the proceedings, and decision of the said Board of Commissioners, and the papers and evidence on which the said decision was founded; and it appearing to the Court that the said Transcript has been duly filed according to law and counsel for the respective parties having been heard, it is by the Court hereby ordered, adjudged and decreed, that the said decision be and the same

is hereby in all things affirmed; and it is likewise further ordered, adjudged and decreed that the claim of the Appellees is a good and valid claim and that the said claim be and the same is hereby confirmed to the said "Isla de la Yegua" or "Mare Island" with its natural boundaries.

At a Stated Term of the District Court of the UNITED STATES OF AMERICA, for the Northern District of California, held at the Court Room, in the City of San Francisco, on ..... the .....day of ..... in the year of our Lord one thousand eight hundred and fifty-seven.

Present: The Honorable OGDEN HOFFMAN, District Judge.

D. C. 311: L. C. 307.

THE UNITED STATES,

vs.

G. W. P. BISSELL and WM. H. ASPINWALL.

The Attorney General of the United States having given notice that appeal in this case will not be prosecuted, and a stipulation to that effect having been entered into by the District Attorney:

On motion of the District Attorney it is Ordered, Adjudged and Decreed that the appeal heretofore granted in this case to the Supreme Court of the United States be vacated, and that claimants have

leave to proceed under the decree of this Court heretofore rendered in their favor, as under Final Decree.

At a Stated Term of the District Court of the UNITED STATES OF AMERICA, for the Northern District of California, held at the Court Room, in the City of San Francisco, on Wednesday the first day of April in the year of our Lord one thousand eight hundred and fifty-seven.

Present: The Honorable OGDEN HOFFMAN, District Judge.

D. C. 311: L. C. 307.

THE UNITED STATES,

vs.

G. W. P. BISSELL and WM. H. ASPINWALL.

In this case on application of the U. S. Attorney made in open Court, it is Ordered by the Court, that an appeal in behalf of the United States from the final decision of this Court rendered at the present term, be and the same is hereby granted; and that a certified transcript of the pleadings, evidence, depositions and proceedings in the said cause be sent to the Supreme Court without delay.

[Endorsed]: Filed April 1st, 1857.

In the District Court of the United States for the Northern District of Cala.

D. C. 311: L. C. 307.

THE UNITED STATES,

vs.

G. W. P. BISSELL and WM. H. ASPINWALL.

In pursuance of notice from the Attorney General of the United States, it is hereby stipulated and agreed that the appeal to the Supreme Court of the United States heretofore granted in this case, be vacated, and that claimants have leave to proceed under the decree of this Court heretofore rendered in their favor, as under Final Decree.

San Francisco, ...1857.

Halleck, Peachy & Billings,
Attys. for Appellees.

In the Southern Division of the United States District Court for the Northern District of California.

No. 311—Transcript No. 307. Mare Island.

UNITED STATES OF AMERICA,

Appellant,

vs.

G. W. P. BISSELL and W. H. ASPINWALL,

Appellees.

On appeal from the final decision of the Board of Land Commissioners to ascertain and settle private land claims in the State of California under the Act of Congress, approved on the 3rd day of March, 1851.

DECREE NUNC PRO TUNC.

This cause came on to be heard at a stated term of the Court on Appeal from the final decision of the Board of Commissioners to ascertain and settle private land claims in the State of California, under the Act of Congress, approved the third of March, A. D. 1851, upon the transcript of the proceedings and the decision of said Board of Commissioners confirming the claim of the Appellees and the predecessors in interest, and the papers and evidence on which the said decision was founded; and it appearing to the Court that the said transcript has been duly filed according to law, and Counsel for the respective parties having been heard, it is by the Court hereby ordered, adjudged and decreed,

that the said decision be and the same is hereby in all things affirmed; and it is likewise further ordered, adjudged and decreed, that the claim of the Appellees is a good and valid claim, and that the said claim be and the same is hereby confirmed to the said "Isla De LaYegua" or "Mare Island" with its natural boundaries.

IT FURTHER APPEARING by the minutes, records and proceedings of this court, that on March 2nd, 1857, the above entitled Court made its Order duly entered in the minutes of said Court, directing the entry of a Decree of Confirmation in the above entitled matter by consent of the United States District Attorney, and that by accident, oversight, inadvertence or excusable neglect, no decree in conformity with said Order and Judgment has as yet ever been entered herein, and that the files of the Clerk of this Court contain an unsigned decree confirming the said decision of the said Board of Land Commissioners, and that this case is still pending and undecided herein;

AND IT FURTHER APPEARING, that all the right, title and interest of the Appellees herein in and to the said claim, have passed to and have been acquired by the United States, the Appellant herein, by purchase from the said Appellees, and that all persons claiming by, under, or through the Appellants or the Appellees or any of them, are chargeable with notice of this action and of everything that has been done therein, and therefore, that no rights of third persons have intervened or could intervene.

OW, THEREFORE, on motion of Geo. J. Hat-
, Esq., United States Attorney for the Northern
rict of California, Attorney for said Appellant,
e on the 15th day of April, 1930, that a decree
ntered Nunc Pro tunc in conformity with the
Order, and the Court now being fully advised
he premises, the said Motion is hereby granted
it is hereby ordered that this decree of confir-
on in said cause confirming in all particulars
decision of said Board of Land Commissioners
ntered Nunc Pro Tunc, as of the 2nd day of
ch, in the year 1857.

ated in open Court this 15th day of April, 1930.

A. F. ST. SURE,
United States District Judge.

Endorsed]: Filed and entered April 15, 1930,
pro tunc as of March 2, 1857.
ntered in Vol. 25 Judg. and Decrees at page

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is conveyance made and entered into this
ty-fifth day of October in the year of our Lord
housand eight hundred and forty-nine by Vic-
Castro, by Mariano G. Vallejo, his attorney,
y of the first part and Bezer Simons and John
risbie, witnesseth that the said Victor Castro
nd in consideration of the sum of seven thou-
five hundred dollars the receipt whereof is
y acknowledged hath bargained and by these
nts doth grant, bargain and sell unto the said

Bezer Simons and John B. Frisbie all that tract and parcel of land known as Mare Island situate in San Pablo Bay at the mouth of Napa Creek.

To have and to hold the above released premises the said Bezer Simons and John B. Frisbie, their heirs and assigns to their use and behoof forever.

In Witness Whereof the said Victor Castro by Mariano G. Vallejo, his attorney, as aforesaid hath hereunto set his hand and seal this twenty-fifth day of October in the year of our Lord one thousand eight hundred and forty-nine.

[Seal] Victor Castro,

[Seal] By Mariano G. Vallejo.

Sealed and delivered in presence of Thos. G. Peachy, Robert R. Pierpont.

District of Sonoma,
Territory of California.

Personally appeared before me Prefect for the District of Sonoma the above named M. G. Vallejo who acknowledged the above signature to be his deed that the above deed was executed for the purposes therein mentioned by Victor Castro by power of attorney granted to said Vallejo.

Witness my hand and seal this 30th day of October, 1849.

[L. S.] Chas. P. Wilkins,
Prefect for Sonoma District.

Recorded Nov. 3d, 1949.

State of California,
County of Solano—ss.

I certify the foregoing to be a true copy of an instrument of writing of record in my office in Book A, page 442 of Solano County Records.

Witness my hand and seal this the 9th day of April, A. D. 1859.

[Seal] Wm. J. Hooton,
County Recorder of said county.
By Perry Williams,
Dep. Recorder.

DEED

John B. Frisbie to Geo. W. P. Bissell

This Indenture made and executed this sixteenth day of July Eighteen hundred and fifty-two by and between John B. Frisbie of the City and County of Sonoma and State of California of the first part, and G. W. P. Bissell of the City and County of San Francisco and State aforesaid of the second part, WITNESSETH That the said party of the first part for and in consideration of the sum of four thousand dollars lawful money of the United States of America to him in hand paid the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part his heirs, executors, administrators and assigns all the right, title and interest of the said party of the first part of, in and

to that certain piece of property situate in the County of Sonoma and State of California, known as Mare Island, the said interest being one undivided fourth of said Island, less one tenth and one sixteenth of the whole. To Have and to Hold all and singular the above described premises together with the appurtenances unto the said party of the second part, his heirs and assigns forever. In Witness Whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

[Seal] John B. Frisbie.

Sealed and delivered in the presence of
M. J. Vallejo.
Martin E. Cooke

State of California
County of Sonoma—ss.

On this sixteenth day of July Eighteen hundred and fifty-two personally appearing before me the within named John B. Frisbie to me known to be the person named and described in the within Instrument and who executed the same, and acknowledged that he had executed the same voluntarily as his own free act and deed for the uses and purposes therein mentioned. In Witness Whereof I have hereunto set my hand and private seal having as yet no official seal on the day and year above written.

[Seal] Martin E. Cooke
Notary Public.

[Endorsed]: Filed for Record on this the 19th day of July A. D. 1852, at 8 o'clock A. M. I Hendley

Recorder of Sonoma County By I. A. Brewster, Deputy.
and Recorded in Book "H" of Records of Land Titles in Sonoma County on pp. 148 and 149: on this July 19, A. D. 1852.

I. Hendley, Recorder,
By I. A. Brewster, Deputy.

COPY OF DEED

Wm. H. Aspinwall, et al., to the United States of America

To All Whom these Presents Shall Come

George W. P. Bissell of the City of San Francisco in California, William H. Aspinwall of the City of New York in the State of New York and Mary S. McArthur of the City of Baltimore, Maryland Send Greeting, WHEREAS the said parties as tenants in common are owners and proprietors of a tract of land usually known as Mare Island in California, now recently surveyed and agreed to be purchased for the purpose of a Navy Yard for the public use on behalf of the United States of America and which has recently been selected for such purpose, and the interest and proportions of the said owners respectively in the said Island are as follows that is to say of the said George W. P. Bissell fifty eight eightieths parts and one fourth of an eightieth part (the whole being divided into equal eightieth parts) the said William H. Aspinwall sixteen and three-fourths eightieths parts and the said Mary S. McArthur as sole devisee of William P. McArthur deceased of the remaining five eigh-

tieth parts; and they have agreed to convey the same to the use of the United States of America for the consideration hereinafter expressed paid to them severally and respectively according to their several and respective interests aforesaid with the exception hereinafter expressed.

Now These Presents Witness that the said George W. P. Bissell, William H. Aspinwall and Mary S. McArthur in consideration of the sum of eighty-three thousand four hundred and ninety one dollars to them paid in proportion to their said interests respectively on behalf of the United States of America the receipt of which is hereby acknowledged have granted, bargained and sold, released and quit claimed and by these presents do grant, bargain, sell, release and quit claim unto the United States all that tract of land and island called and known as Mare Island in the Bay of San Pablo as recently surveyed by the Board of Officers of the United States sent to California for the selection of a site for the Navy Yard then including all the tule or low land and marsh belonging to the same or which has ever been separated or claimed to belong to the same and all the waters, harbours, bays, creeks and other waters privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging (excepting only as hereinafter is expressed) with the reversion and reversions, remainder and remainders, rents, issues and profits thereof. To have and to hold the same to the United States of America and their assigns forever with

the mutual agreement that the said Grantors shall have the right of establishing a ferry to and from the said Island across the Napa Creek the location of which ferry on the shore of the mainland shall be where the Grantors, their heirs and assigns shall select with the assent and approval of the Secretary of the Navy of the United States for the time being on the report of the officers at the time representing the Navy department at San Francisco for the landing of which ferry on the said Island to be selected and located by the said grantors, their heirs and assigns with such assent and approval as last aforesaid. However ferry privilege and landing place shall be subject to the following control and restrictions on the part of the United States. That the said ferry and landing place, shall at all times for the purpose of police and the segregation of persons and things in the Navy Yard be subject to such orders as the secretary of the Navy or the proper officer of the United States or of the Navy Department shall from time to time establish for the safety of the public property or the good government of the said Navy Yard and Mare Island and also that no building of any kind shall be erected on the landing place without such consent as aforesaid and also if the Secretary of the Navy for the time being shall for the security or advantage of the United States in reference to the said public use of Mare Island require a removal of the said ferry landing to any other convenient place on the Eastern shore of said Mare Island for

the purpose of such landing place and the ferry privilege shall apply to such new landing place and all other terms hereof in relation thereto and so on from time to time as changes in this respect may be found necessary on the part of the United States and on every such change it shall be lawful for said grantors, their heirs and assigns to remove any buildings which they may have erected with any fixtures for the purposes of the ferry and on the direction of the Secretary of the Navy for the time being it shall be the duty of the said grantors, their heirs and assigns to conform to such removal with all convenient speed.

And the said grantors for themselves according to their several interests aforesaid and each for his heirs and assigns and for all claiming by or under them respectively hereby severally covenant to and with the United States of America and their assigns that they severally and their heirs and assigns shall and will at the request of the United States of America or their assigns and at their expense execute all such further deeds and other assurances in the Law for the more perfect assurance unto them of the promises hereby purporting to be granted as shall be reasonably advised by their counsel learned in the law.

In Witness Whereof the said George W. P. Bissell by William H. Aspinwall his attorney (by letter of attorney dated July 30th, 1852 herewith delivered) and the said William H. Aspinwall and Mary S. McArthur have hereunto set their hands

and seals the fourth day of January, one thousand eight hundred and fifty three.

G. W. P. Bissell [L.S.]
& Wm. H. Aspinwall [L.S.]
Atty
Wm. H. Aspinwall [L.S.]
Mary S. McArthur [L.S.]

Sealed and delivered in the presence of
As to the signature of

G. W. Bissell — Wm. Macrea
W. H. Aspinwall — I. C. Lanum
Atty. and — J. D. Pratt
William H. Aspinwall — Jno. D. Young
As to Mary S. Arthur

State of New York
New York City & County.

I, Joseph C. Laurence, Commissioner in and for the State of New York duly appointed and commissioned by the Governor of the State of California to take the acknowledgments and proof of deeds and other instruments of writing under seal to be used or recorded in same State of California and to administer oaths and affirmations, do hereby certify that on the day of the date hereof, before me personally, came William H. Aspinwall in his individual capacity and as the attorney in fact of George W. P. Bissell the persons described in and who executed the foregoing deed of conveyance and acknowledged that he had executed the same in his individual capacity and as the attorney in fact of George W. P. Bissell one of the parties

therein described by virtue of a power of attorney duly executed *by the said* for the purposes therein mentioned.

And I further certify that the persons who made the said acknowledgment are personally known to me to be the persons described in and who executed the same deed.

Given under my hand and official Seal the fourth day of January in the year of our Lord one thousand eight hundred and fifty three.

[L.S.] Joseph C. Laurence
Commissioner of the State of California in and for the State of New York, 68 Water Street, New York.

State of Maryland
Baltimore, City & County—ss.

On this fifth day of January A. D. 1853 before me, Jabez D. Pratt, a Commissioner appointed by the State of California in and for the State of Maryland to take the proof and acknowledgment of deeds &c personally appeared Mary S. McArthur, one of the grantors to the within deed of conveyance and personally known to me and having signed & sealed the same before me acknowledged the same to be her free act and deed and desires the same might be recorded as such.

In Witness Whereof I have hereunto set my hand and affixed my official seal on the day & year last aforesaid

Jabez D. Pratt
Commr. of California.

State of California
County of Solano

The foregoing instrument of writing was received by me for record on the 18th day of April A. D. 1853 at 9 o'clock A. M.

Jos. P. Vaughn
County Recorder.

State of California
County of Solano—ss.

I certify the foregoing to be a true copy of an instrument of writing of Record in my office in Book H, pages 10, 11, 12 & 13 of Solano County Records.

Witness my hand and seal of the County Recorder's office of said County this the 9th day of April A. D. 1857.

[Seal] William L. Hooton
County Recorder of said County.
By Perry Williams
Dep. Recorder.

Mr. PECKHAM: We offer a certified copy of the Castro grant, recorded in Book "H" of Deeds, Page 161. (Record is in Spanish)

Mr. BURKE: I would like to have that noted in the Record.

(The Castro grant and translation are offered in evidence as "Plaintiff's Exhibit D".)

Mr. PECKHAM: We offer the Bissell and Aspinwall deeds, with the acompanying papers, certi-

fied and recorded in the Office of the County Recorder of Solano County. The accompanying papers are all of the documents that were recorded by the Secretary of the Navy at the time of the recording of the Bissell and Aspinwall deeds.

(The Bissell and Aspinwall deeds and accompanying papers are offered in evidence as "Plaintiff's Exhibit E".)

PLAINTIFF'S EXHIBIT E.

[Endorsed]: Filed Aug. 5, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

TO ALL WHOM THESE PRESENTS SHALL COME: George W. P. Bissell of the City of San Francisco, in California, William H. Aspinwall of the City of New York, in the State of New York and Mary S. McArthur of the City of Baltimore, Maryland send Greeting.

Whereas the said parties as tenants in common are owners and proprietors of a tract of land usually known as Mare Island in California, now recently surveyed and agreed to be purchased for the purpose of a Navy Yard and for the public use on behalf of the United States of America and which has recently been selected for such purpose, and the interests and proportions of the said owners respectively in the said Island are as follows: that is to say:—Of the said George W. P. Bissell fifty eight eightieth parts and one fourth of an eightieth

part (the whole being divided into equal eightieth parts) the said William H. Aspinwall, sixteen and three fourths eightieth parts, and the said Mary S. McArthur as sole devisee of William P. McArthur, deceased of the remaining five eightieth parts; And they have agreed to convey the same to the use of the United States of America for the consideration hereinafter expressed, paid to them severally and respectively according to their several and respective interests aforesaid, with the exception hereinafter expressed. NOW THESE PRESENTS WITNESS: That the said George W. P. Bissell, William H. Aspinwall and Mary S. McArthur in consideration of the sum of Eighty-three thousand four hundred and ninety one dollars to them paid, in proportion to their said interests respectively, on behalf of the United States of America, the receipt of which is hereby acknowledged, have granted, bargained and sold, released and quitclaimed and by these presents do grant, bargain, sell, release and quitclaim unto the United States, all that tract of land and Island called and known as Mare Island in the Bay of San Pablo, as recently surveyed by the board of officers of the United States sent to California for the selection of a site for the Navy Yard there, including all the Tule or low land and Marsh belonging to the same or which has ever been reputed or claimed to belong to the same, and all waters, harbors, bays, creeks, and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging

(excepting only as hereinafter expressed) with the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To Have and to hold the same to the United States of America, and their assigns forever, with the mutual agreements that the said grantors shall have the right of establishing a ferry to and from the said Island across the Napa Creek, the location of which ferry on the shore of the mainland shall be where the grantors, their heirs and assigns shall select with the assent and approval of the Secretary of the Navy of the United States for the time being on the report of the officer or officers at the time representing the Navy Department at San Francisco, for the landing of which Ferry on the said Island, a piece of land on the margin and shore of said Island, to be selected and located by the said Grantors their heirs and assigns with such assent and approval as last aforesaid, however ferry privilege and landing place shall be subject to the following control and restrictions on the part of the United States, That the said Ferry and landing place, shall at all times for the purpose of police, and the regulation of persons and things in the Navy Yard *by* subject to such orders as the Secretary of the Navy or the proper officer of the United States or of the Navy Department shall from time to time establish for the safety of the public property or the good government of the said Navy Yard and Mare Island; And also that no building of any kind shall be erected on the landing

place without such consent as aforesaid; and also if the Secretary of the Navy for the time being shall for the security or advantage of the United States in reference to the said Public use of Mare Island require a removal of the said ferry landing to any other convenient place on the Eastern shore of said Mare Island for the purpose of such landing place, the landing of the said Ferry shall be removed to such new landing place and the Ferry privilege shall apply to such new landing place and all other terms hereof in relation thereto, and so on from time to time as changes in this respect may be found necessary on part of the United States and on every such change it shall be lawful for said grantors their heirs and assigns to remove any buildings which they may have erected with any fixtures for the purposes of the Ferry and on the direction of the Secretary of the Navy for the time being it shall be the duty of the said grantors their heirs and assigns to conform to such removal with all convenient speed. And the said grantors for themselves according to their several interests aforesaid, and each for his heirs and assigns and for all claiming by or under them respectively hereby severally covenant to and with the United States of America and their assigns that they severally and their heirs and assigns shall and will at the request of the United States of America or their assigns and at their expense execute all such further deeds and other assurances in the law for the more perfect assurance unto them of the premises hereby purport-

ing to be granted as shall be reasonably advised by their counsel learned in the law.

In Witness Whereof, the said George W. P. Bissell by William H. Aspinwall his attorney (by letter of Attorney dated July 30th, 1852 herewith delivered) and the said William H. Aspinwall and Mary S. McArthur have hereunto set their hands and seals the fourth day of January, in the year of our Lord one thousand eight hundred and fifty three.

G. W. P. Bissell [L.S.]
By Wm. H. Aspinwall, Atty. [L.S.]
Wm. H. Aspinwall [L.S.]
Mary S. McArthur [L.S.]

Signed and Delivered in the Presence of:

As to the signatures of G. W. Bissell, W. H. Aspinwall, Atty., and William H. Aspinwall.

Wm. Macrea
J. C. Laurence.

J. D. Pratt—Jno. J. Young, as to Mary S. *Arthur.*

State of New York,
New York City & County.

I, Joseph C. Laurence, Commissioner in and for the State of New York duly appointed and commissioned by the Governor of the State of California, to take the acknowledgments and proof of deeds and other instruments of writing under seal to be *used* or recorded in same State of California and to administer oaths and affirmations Do Hereby Certify that on the day of the date hereof before me

personally came William H. Aspinwall in his individual capacity and as the Attorney in fact of George W. P. Bissell the persons described in and who executed the foregoing deed of conveyance and acknowledged that he has executed the same in his individual capacity and as the Attorney in fact of George W. P. Bissell one of the parties therein described by virtue of a power of Attorney duly executed by the said George W. P. Bissell for the purposes therein mentioned. And I further certify that the persons who made the said acknowledgment are personally known to me to be the persons described in and who executed the said deed.

Given under my hand and official seal this fourth day of January in the year of Our Lord one thousand eight hundred and fifty-three.

[Seal] Joseph C. Laurence,
Commissioner of the State of California in and for the State of New York, 68 Water Street, New York.

State of Maryland,
Baltimore City & County—ss.

On this fifth day of January, A. D. 1853, before me, Jabez D. Pratt, a Commissioner appointed by the Governor of the State of California, in and for the State of Maryland, to take the proof and acknowledgment of deeds, etc., personally appeared Mary S. McArthur, one of the grantors to the within deed of conveyance and personally known to me and having signed and sealed the same before me ac-

knowlelged the same to be her free act and deed and desires the same might be recorded as such.

In Witnss Whereof, I have hereunto set my hand and affixed my official seal on the day and year last aforesaid.

[Seal] Jabez D. Pratt,
Comr for California.

State of California,
County of Solano.

The foregoing instrument of writing was received by me for record on the 18th day of April, A. D. 1853 at 9 o'clock A. M.

Jos P. Vaughn, County Recorder.

KNOW ALL MEN BY THESE PRESENTS: that we William H. Aspinwall and Samuel W. Comstock of the City of New York, Merchants, are held and firmly bound unto the United States of America in the penal sum of Two Hundred Thousand Dollars lawful money of the United States, to be paid to the said United States or the Secretary of the Navy thereof, For which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, by these presents.

In Testimony Whereof, we have hereunto signed our names and affixed our seals in the City of New York on this twenty eighth day of February in the year Eighteen hundred and fifty three.

Whereas the said William H. Aspinwall in his own right and as Attorney of George W. P. Bissell

of California, and also as Attorney for Mary S. McArthur did on the fifteenth day of December eighteen hundred & fifty two enter into a Contract with the Hon. John P. Kennedy, Secretary of the Navy, in conformity with the terms and stipulations relating thereto, expressed in a letter of the said Secretary of the Navy dated on the tenth day of December Eighteen hundred and fifty two, which letter and the assent of the said William H. Aspinwall are on the files of the Navy Department, whereby the said William H. Aspinwall acting for himself and the other parties hereinabove referred to did covenant and agree to sell to the United States the tract of land in California, in the Bay of San Pablo, known by the name of Mare Island, and did thereby bind himself and all other parties interested in the ownership of the same to convey to the United States by a good and sufficient deed or Deeds, the entire and absolute fee simple Estate in the said tract of land known as Mare Island aforesaid, which conveyance it was stipulated was to be made in consideration of an agreement on the part of the United States to pay to the said William H. Aspinwall, as a full consideration for said purchase whatever portion of the appropriation of one hundred thousand dollars appropriated by Act of Congress of the 31st August 1852 should remain as the unexpended balance thereof after all the expenses of the Commission for the selection of a site for a Navy Yard in California and the performance of the duties assigned to the Board of Officers, charged with that selection should have

been fully paid. And which said Contract or agreement contains also other stipulations which the Parties thereto were to observe, all of which will more fully appear by reference thereto the same being appended to this Bond for the interpretation of the same and as a part thereof.

And Whereas the said William H. Aspinwall acting in his own right, and as attorney for the said George W. P. Bissell, has together with Mary S. McArthur executed a Deed to the United States in pursuance of the above Contract and for the conveyance of the said tract called Mare Island and its appurtenances with covenants for further assurance of the same should be necessary, which deed is dated on the fourth day of January Eighteen hundred and fifty three, and is deposited with the Secretary of the Navy.

Now the condition of the above written obligation is such that if the said William H. Aspinwall shall well and truly observe, perform and fulfil the obligations of the said Contract hereinabove referred to and more particularly set forth in the copy thereof, hereto appended and shall at all times hereafter indemnify and save harmless the United States against any claim or title to the said tract called Mare Island and its appurtenances which may be set up by or through any person or persons claiming under Victor Castro and his assigns or others represented by the said William H. Aspinwall, and shall also indemnify and save harmless the United States against any adverse claim or title in any other person or persons or body politic

which may within two years from the date hereof, be made and thereafter be successfully established against the title proposed to be conveyed by said William H. Aspinwall and those with and through whom he claims to hold the same by which the full and perfect title of the United States as derived by the conveyance of the said William H. Aspinwall and the parties represented by him, may be in anywise impaired, diminished or destroyed and if the said William H. Aspinwall and those whom he represents so far as he and they are bound thereto by the covenants of the deed of conveyance herein above referred to and the contract hereinbefore recited, procure and executed such further conveyance by Deed or Deeds as may become necessary for the complete establishment and security of the title in the United States, in conformity with the true interest of said contract; And also if the said George W. P. Bissell's Power of Attorney to the said William H. Aspinwall shall have been revoked by any matter of fact or of law or if the said George W. P. Bissell shall prior to the date when the Deed herein above referred to or any substitute for the said Deed, shall be sent to California and be received there to be registered and recorded the same to be sent forward without unreasonable delay have disposed of or encumbered the said lands so that the title to the United States therein may be impaired, in which event if all such incumbrances or acts tending to impair the said title be not forthwith removed or defeated and by reason of such failure to remove or defeat them, the Secretary of

the Navy, should think fit to reconvey or relinquish the said land to the Grantors named in the deed herein above mentioned their heirs and assigns, and the said William H. Aspinwall his heirs, executors, administrators or assigns in that case should refund and repay to the United States the amount which shall have been paid to him as the consideration of the said purchase with interest at the rate of six per cent on the same, then upon this and all other contingencies hereinbefore expressed this obligation shall become void but otherwise it shall stand and remain in full force and virtue according to its tenor and effect.

Wm. H. Aspinwall (L.S.)
Saml W. Comstock (L.S.)

Signed, Sealed and Delivered in presence of:
Wm. Macrea.

Navy Department
December 10th, 1852.

Sir:

I have received Mr. William H. Aspinwalls letter of the 4th inst and yours of the 7th. Mr. Aspinwall being as you inform me fully authorized to act in behalf of all the owners of Mare Island in California, for the sale of that property to the United States and to make an absolute engagement & contract for the sale thereof in their names, which shall be binding upon all parties having any interest in this property, I take this occasion to say to you that I am now ready in pursuance of the

authority given to me by the 3rd Section of the Act of Congress of August 31st, 1852, entitled an act making appropriations for the Naval Service for the year ending the 30th of June 1853, CIX of the United States at large, 1st Sess. 32 Con; to conclude a contract for the purchase of Mare Island as recently surveyed & reported by a Board of Officers sent to California for the purpose of selecting a site for a Navy Yard, which Board have returned and made their report to this Department. I understand the basis of a contract proposed by Mr. Aspinwall & by yourself with his authority to be as follows: That Mr. Aspinwall acting for himself and all other parties interested in the ownership of Mare Island or claiming any interest in the same, proposes in their behalf & binds them and himself to convey to the United States by a good and sufficient deed or deeds, the entire and absolute fee simple estate in that tract of land known as Mare Island in California including all the tule or low land and marsh belonging to the same, or which has ever been reputed or claimed to belong to the same giving a quitclaim and full transfer of all the interest of the proprietors in the same and all privileges, rights or claims to the waters, harbors, and creeks supposed or claimed to belong to the said tract known as Mare Island.

That this conveyance is to be made in consideration of an agreement on the part of the United States to pay to the said William H. Aspinwall as a full consideration for the purchase, whatever, portion of the appropriation of One Hundred Thou-

sand Dollars appropriated by the Act of Congress herein above referred to may remain as the unexpended balance of that appropriation, after all the expenses of the Commission for the selection of the site for the Navy Yard and the performance of the duties assigned to the Board of Officers charged with the selection shall have been fully paid. That this sum shall be ascertained as soon as practicable by auditing the accounts of expenses of the Commission and deducting the amount at which they may be stated from the whole amount of the appropriation and upon receiving the proper deed or deeds for a full & perfect conveyance of the title to the tract of land above mentioned, with all its appurtenances and privileges made and executed to the satisfaction of the Department, then the amount ascertained as above to be paid to the said Wm. H. Aspinwall.

It is further proposed as a part of this agreement on behalf of the owners that the United States shall permit a ferry to be established with the shore on the opposite side of the Straits of Carquinez, with a suitable reservation of five hundred feet square on Mare Island for a landing which proposition is modified at my instance to be received as follows:

That the United States shall agee to allow a convenient ferry for intercourse with the opposite shore with such reservation of land for a landing place on Mare Island as the Government may find convenient, but the ferry always to be so far under the control of the Government as to compel its

removal to any part of the public property which may be designated by the Navy Department for the convenience or advantage of the Government whenever or as often as it may become necessary with reference to the security or advantage of the public interest in the operation which may be conducted on Mare Island, and also if need be to forbid any communication between the tract called Mare Island and the opposite, but upon such conditions as the Government may think it necessary to prescribe, this control being deemed necessary to be reserved to the Government with a view to the good order and police regulations of the Navy Yard which it is the design of the Government to establish at this place. It being also understood that no building of any kind shall be erected on Mare Island upon the landing place of any ferry which may be permitted, without the consent of the Navy Department and that any building or structure which may be erected with such consent shall be subject to removal at any time by the order or authority of the Navy Department.

I am willing to accept the proposition of Mr. Aspinwall as above stated with the modifications herein made, as soon as he shall apprise me of his consent to the sale on these terms which he may do by appending that consent in a note to this letter & returning the same to me.

I am Respectfully Your Obdt Servant

John P. Kennedy.

Wm. H. Davidge, Esq., Agent of Wm. H. Aspinwall Esq., New York.

I assent fully & unconditionally to the foregoing on behalf of the several owners of Mare Island.

Wm. H. Aspinwall.

New York, Dec. 15th 1852.

The above copy reaffirmed by me as agent of Wm. H. Aspinwall this 1st March, 1853.

Wm. H. Davidge.

State of California,
County of Solano.—ss.

The foregoing instruments of writing were received by me for record on the 18th day of April, 1853 at 9 o'clock A. M.

Joseph P. Vaughn, County Recorder.

COPY OF WILL.

The last will and testament of William P. McArthur of the United States Navy, late of the City of Washington, D. C. now of the City of San Francisco, State of California. I the said William P. McArthur being of sound and desposing mind and desposing mind and memory do make and publish this my last will and testament which is as follows: I give and bequeath to my wife Mary S. McArthur all and singular my real and personal estate of every name and description that may remain after the payment of my just debts and funeral expenses. And I do hereby appoint Joseph M. McArthur and Augustus I. Bowie Executors of this my last will and testament.

In testimony Whereof I have hereunto set my hand and affixed my seal, this the Nineteenth

day of November in the year Eighteen hundred and fifty (Nov. 19th 1850).

W. P. McArthur.

The above instrument consisting of one sheet was now here subscribed by William P. McArthur the testator, in the presence of each of us and was at the same time declared by him to be his last will and testament and we at his request signed our names hereto as attesting witnesses this the Nineteenth day of November A. D. 1850.

H. Ray Bowie
I. H. McDugall

I, John E. Addison, Clerk of the Probate Court of San Francisco County hereby certify the foregoing to be a true copy of the last will and testament of W. P. McArthur decd admitted to Probate and now on the records of said court.

J. E. Addison, Clk
per J. I. Papy, D. C.

State of California,
County of Solano.

The foregoing instrument of writing was received by me for record on the 18th day of April A. D. 1853, at 9 o'clock A. M.

Jos. P. Vaughn, County Recorder.

State of California
County of San Francisco.

The last will of William P. McArthur deceased, a copy of which is hereto annexed having been proved and recorded in the Probate Court of the

County of San Francisco, Augustus I. Bowie, who is named therein is hereby appointed Executor.

Witness John E. Addison, Clerk of the Probate Court of the County of San Francisco, with the seal of said Court affixed this 8th day of February A. D. 1851. By order of the court.

J. E. Addison, Clerk
Per J. I. Papy, D. C.

State of California
County of Solano.

The foregoing instrument of writing was received by me for record on the 18th day of April A. D. 1853, at 9 o'clock A. M.

Jos. P. Vaughn, County Recorder.

KNOW ALL MEN BY THESE PRESENTS: That I, Mary S. McArthur of the City of Baltimore, and State of Maryland, widow, and sole legatee under the will of Lieut. William P. McArthur, U. S. N., have made, constituted and appointed and do by these presents make, constitute and appoint William C. Young of the City and Co. of New York and State of New York my true and lawful attorney for me and in my name, place and stead, to bargain, sell, grant, release and convey to such person or persons and for such consideration or considerations as he my said attorney shall seem most to my advantage and profit all my undivided sixteenth part of Mare Island situated in the County of *Sonoma,* and State of California, and upon such sale

or sales to make, execute, acknowledge and deliver good and sufficient deeds and conveyances for the same. Giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue of these presents.

In Witness Whereof, I have hereunto set my hand and seal this thirteenth day of December A. D. 1852.

Mary S. McArthur [L.S.]

Sealed and delivered in presence of:
Jabez D. Pratt, Jno. J. Young.

State of Maryland,
City and County of Baltimore.

Be it remembered that on this thirteenth day of December A. D. 1852 before me, Jabez D. Pratt, a commissioner appointed by the Governor of the State of California, in and for the State of Maryland aforesaid to take the proof and acknowledgment of deeds etc to be used or recorded in the State of California personally appeared Mary S. McArthur personally known to me to be the person named in and described as the party grantor to the within power of attorney and having signed and sealed the same in my presence, she acknowledged

that she executed the same as her voluntary act and deed for the purposes therein expressed.

Witness my hand and official seal on the day and year last aforesaid.

Jabez D. Pratt,
Com. for Cal.

State of California,
County of Solano.

The foregoing instrument of writing was received by me for record on the 18th day of April A. D. 1853 at 9 o'clock A. M.

Jos. P. Vaughn,
County Recorder.

KNOW ALL MEN BY THESE PRESENTS: That I, George W. P. Bissell of the City and County of San Francisco, State of California, have made, constituted and appointed and by these presents do make, constitute and appoint William H. Aspinwall of New York my true and lawful attorney for me and in my name, place and stead to grant, bargain, and sell, lease or otherwise dispose of all my right, title and interest in that piece or parcel of land lying and being situate in the State of California, County of Sonoma, known as "Mare Island" or any part or parcel thereof for such sum or price and on such terms as to him shall seem meet and for me and in my name to make, executed, acknowledge and deliver good and sufficient deeds and conveyances for the same, and until the sale thereof to let and demise the said Real Estate for such sum as to

him shall seem meet and upon such terms as he may deem proper to ask, demand, collect, recover and receive all sums of money which shall become due, owing and payable to me by means of such bargain and sale or lease and demise, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation hereby ratifying and confirming all that my said attorney or his substitute or substitutes shall lawfully do or cause to be done by virtue hereof.

In Witness Whereof I have hereunto set my hand and seal the thirtieth day of July in the year one thousand eight hundred and fifty two.

G. W. P. Bissell [Seal]

Signed and delivered in the presence of: the words "my right, title and interest in" interlined before signing.

E. Giles

State of California,
City and County of San Francisco—ss.

On this thirtieth day of July A. D. 1853, before me, Lewis W. Sloat, a Notary Public duly appointed and commissioned under the Great Seal of the State of California, authorized by law to take acknowledgments, dwelling in the City of San Francisco, County aforesaid, came Geo. W. P. Bissell, to me known to be the individual described in and who executed the within instrument and acknowledged

that he executed the same for the purposes ther
mentioned, of his own free act and deed.

In Witnss Whereof, I have hereunto set my ha
and affixed my Official Seal, the day and year ab
written.

[Seal] L. W. Sloat,
Notary Public

State of California,
County of Solano.

The foregoing instrument of writing was receiv
by me for record April 18th, A. D. 1853, at
o'clock A. M.

Jos. P. Vaughn,
County Recorder

KNOW ALL MEN BY THESE PRESENT
That I, William C. Young, Attorney for Mary
McArthur, have made, constituted and appoint
and by these presents do make, constitute and a
point Wm. H. Aspinwall my true and lawful att
ney for me and in my name, place and stead
grant, bargain, and sell, lease or otherwise dispo
of all the right, title and interest of Mary S. M
Arthur in that piece or parcel of land lying a
being situate in the State of California, County
Sonoma, known as Mare Island, or any part or pa
cel thereof for such sum or price and on such ter
as to him shall seem meet, giving and granting un
my said attorney full power and authority to do a
perform all and every act and thing whatsoever
quisite and necessary to be done in and about

premises, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In Witness Whereof, I have hereunto set my hand and seal the fifteenth day of December in the year one thousand eight hundred and fifty two.

Wm. C. Young [L.S.]

Sealed and delivered in the presence of:
Frederick Hoffman.

City and County of New York—ss.

On the fifteenth day of December 1852, before me, came Frederick Hoffman with whom I am personally acquainted, who being by me duly sworn says: that he resides in the City of New York, that he knows William C. Young & knows him to be the same individual described in and who executed the within power of attorney. That he executed the same in deponents presence & deponent thereupon became the subscribing witness thereto.

L. S. Hoffman,
Com. of Deeds, 79 *Nassen* St.

State of California,
County of Solano.

The foregoing instrument of writing was received by me for record April 18th, A. D. 1853, at 9 o'clock A. M.

Jos. P. Vaughn,
County Recorder.

Copy Navy Department, Dec. 13th, 1852.

Gentlemen:

You will oblige me by stating your opinion as to the value of the tract lately surveyed by you in California for a site for a Navy Yard, known as Mare Island. I desire to have your estimate of its value with all its appendages and advantages regarding depth of waters, harbors etc. Your opinion may be formed without reference to the question of title which I could not expect you to express an official judgment, my object being to obtain some guide in the estimate of its value for land and water with a view to a contract of purchase.

Very Respectfully,
Your Obdt Servt.
(Signed) John P. Kennedy.

Comnd Jno. D. Sloat
Comdt W. S. Ogden
Lieut. I. F. Blunt
W. S. Sanger, Engineer.

Copy Washington, December 13th, 1852.

Hon. John P. Kennedy
Secretary of the Navy
Sir:

In answer to your letter of this date asking "your (our) opinion as to the value of the tract lately surveyed by you (us) in California for a site for a Navy Yard, known as Mare Island" and desiring to have "your (our) estimate of its value with all

its appendages and advantages regarding depth of water, harbors, etc" and stating that "your (our) opinion may be formed without reference to the question of title of which I (you) could not expect you (us) to express an official judgment, my (your) object being to obtain some guide in the estimate of its value for land and water, with a view to a contract of purchase," we have the honor to state the Island including the tule opposite Vallejo contains about nine hundred acres in addition to a large tract of tule extending toward Napa and Sonoma, there is ample space for all the buildings required for a Navy Yard with good anchorage for Ships of War, and as stated in our report of the 6th ult. we consider it the most eligible location near San Francisco. In reference to the value of this site for the purposes of a Naval establishment, combining as it does all the advantages stated in our Report, with respect to the depth of water and general commodiousness as a harbor, we are of the opinion tho' we are aware that a large portion of it, say nearly three fourths was recently purchased for a much less sum, that it would not perhaps be over-estimated for the contemplated uses of the United States at one hundred thousand dollars.

Very Respectfully,
Your Obdt Servt.
(Signed) John D. Sloat,
Wm. S. Ogden, Comn U. S. N.
Simon Fraser Blunt, Lt. U. S. N.
W. P. S. Sanger

State of California,
County of Solano.

The foregoing instruments of writing were received by me for record April 18th, 1853 at 9 o'clock A. M.

Jos. P. Vaughn,
County Recorder.

I respectfully state for the information of the Secretary of the Navy that the expenses of the Commission under Commodore Sloat for the selection of a site for a Navy Yard in California, which were properly chargeable to the appropriation of $100,000 made for that object at the last Session of Congress, so far as they have come to the knowledge of this office, amount to Eleven Thousand Five Hundred and eight dollars and twenty cents.

It is probable that all the accounts which include such expenses have been rendered.

H. O. Dayton,
4" Auditor.

4" Auds Office
December 28, 1852.

State of California
County of Solano.

The foregoing instrument of writing was received by me for record April 18th, 1852 at 9 o'clock A. M.

Jos. P. Vaughn,
County Recorder.

State of California,
County of Solano—ss.

I, F. M. DICKEY, County Recorder in and for the County of Solano, State of California, do hereby certify the annexed to be a full, true and correct copy of the original record thereof, as the same appears of record in my office in Liber H. of Deeds, pages 7 to 24 inclusive, And I do further certify that I have compared the same with the original record thereof.

In Witness Whereof, I have hereunto set my hand and seal this 18 day of May, A. D. 1931.

F. M. Dickey,
County Recorder.
M. E. Buckingham,
Deputy Recorder.

Mr. PECKHAM: We offer as Government's Exhibit "F" the report of the Smith Board for the adoption of a site for a Navy Yard on the West Coast, together with the reservation withdrawal from entry by President Fillmore, dated November 6, 1850, of Mare Island, and, "7th, the land on the eastern side of Mare Island Straits, beginning at the hills between those straits and the City of Benicia, about 2000 to 2500 yards from the former and extending in a line nearly parallel to it, to a point opposite the northern extremity of Mare Island, and thence to the straits, so as to join them at a point about 800 yards north of the northernmost high hills on the eastern side of the straits." That is the executive order of President Fillmore: [177]

This was before the passage of the act authorizing the purchase of the reservation as a Navy Yard, August 31, 1851.

(The report of the Smith Board, etc., is received in evidence as "Plaintiff's Exhibit F".)

PLAINTIFF'S EXHIBIT F.

[Endorsed]: Filed Aug. 5, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

United States
DEPARTMENT OF THE INTERIOR
General Land Office
Washington

July 10, 1931.

I hereby certify that the annexed copy of Executive Order, dated November 6, 1850, is a true and literal exemplification of the original on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] D. K. Parrott
Acting Assistant Commissioner of the General Land Office.

The President of the United States, exempts and reserves from sale, for public purposes, the follow-

ing tracts or parcels of land in the State of California.

In the Bay of San Francisco, California.

1st. From a point 800 yards south of Point José to the southern boundary of the Presidio, along the southern boundary to its western extremity and thence in a straight line to the Pacific ocean, passing by the southern extremity of a pond that has its outlet into the channel between Fort Point, and Point Lobos.

2d. From the southern boundary of Sau Solito bay, a line parallel to the channel of entrance, to the Pacific.

3d. Yerba Buena Island.

4th. Alcatrazes Island.

5th. Angel Island.

On the Eastern side of the Bay of San Pablo.

6th. Mare Island.

7th. The land on the Eastern side of Mare Island straits, beginning at the high hills between those straits and the City of Benicia, about 2000 to 2500 yards from the former, and extending in a line nearly parallel to it, to a point opposite the northern extremity of Mare Island, and thence to the straits so as to join them at a point about 800 yards north of the northernmost high hills on the eastern side of the straits.

Millard Fillmore

Washington, Nov. 6, 1850.

[Matter in margin illegible.]

UNITED STATES OF AMERICA
War Department

Washington, July 13, 1931.

I hereby certify that the papers and sketch attached hereto are true copies of the originals in the Office of the Chief of Engineers, U. S. Army and described as follows:

Report made to the Secretary of War March 31, 1850, by John L. Smith, Bvt Col and Senior Member of the Commission of Navy and Engineer Officers for the examination of the Coast of the United States on the Pacific; and sketch accompanying report.

Lytle Brown
Major General, Chief of Engineers.

I hereby certify that Lytle Brown, who signed the foregoing certificate, is the Chief of Engineers, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, Patrick J. Hurley, Secretary of War, have hereunto caused the Seal of the War Department to be affixed and my name to be subscribed by the Assistant Chief Clerk of the said Department, at the City of Washington, this 13th day of July, 1931.

[Seal] Patrick J. Hurley
Secretary of War.
By F. M. Hoadley
Assistant Chief Clerk.

To the Honble the Secretaries of the War & Navy Departments, City of Washington.

San Francisco (California) March 31, 1850.

Gentlemen:

The last communication to you from the Commission of Navy and Engineer Officers for the examination of the Coast of the U. S. on the Pacific was dated October 31, 1849, on the eve of our departure for the Sandwich Islands, with a crew furnished for our vessel by Commo. Jones which were to be transferred to the Prebble on our arrival at Honolulu.

In that communication we stated the objects of our visit to the Sandwich Islands to be the procurement of a permanent crew for the Massachusetts, which we had not been and were not likely to be able to effect in these waters, and also to have our vessel thoroughly calked and otherwise repaired which could be done there with more economy and despatch than in this neighborhood.

We left here on the 1st of November and altho we expected to be back by the middle of January we did not reach here until the 17th of this month. Our absence two months longer than had been expected was occasioned chiefly by the time we had to wait at Honolulu until the repairing of our vessel could be commenced, and the time occupied in effecting it—the workmen at the time of our arrival being unable to attend to our vessel until the repairs of a number of whale ships that had prior claims to their services should be completed; and the repairs

needed being far more extensive than had been expected.

Except the disadvantage of the loss of time just mentioned, the objects of our visit to the Sandwich Islands were successfully accomplished. We were very fortunate in shipping a sufficient crew of good men, and our vessel that was scarcely seaworthy is now in good order.

We had hoped to be able to complete our examinations here and to the south of this previously to going to Oregon but the season is now so advanced that it cannot be attempted. The chief difficulties to be encountered in the performance of our duties are supposed to be in the Columbia river and it is therefore our desire to be there, or in its neighborhood, in readiness to take advantage of a favorable time for the examination.

But the most important of our duties relate unquestionably to those waters and we therefore deemed it of paramount importance that our examinations here should be made to the extent necessary to enable us to report our opinion without delay, respecting the minute surveys, levelling, and soundings required to be made to afford the detailed information upon which works of defense and a site for a naval depot would be decided on.

On this account and also to be in the way of receiving any instructions that might during our long absence have reached here for us, we determined, on leaving the Islands to come directly here.

Commo. Jones not being here on our arrival we followed him to Benicia to procure his order

for a transfer to our vessel of some of the Steam Engineers that arrived here in the Falmouth during our absence.

While there we received your communication of the 11 of Dec. last. We also examined Mare Island straits and the ground on each side of them.

We had heard while at Honolulu of the favorable result of soundings made there, at our request, by Lt. Commdg. McArthur of the U. S. Sch. Ewing, in company with Lt. Blunt of our Commission. A copy of the sketch of them furnished to us by Lt. Commdg. McArthur is sent herewith.

Since our return here from Benicia we have examined the land on the southern side of the entrance from the sea and also the Islands in this neighborhood. We had examined the northern side of the entrance some time ago.

The result of our examinations enables us to state the following as the surveys levellings and soundings in these waters which will be needed to afford the information desired as a guide to our decisions.

1. From a point 800 yards south of point José to the southern boundary of the Presidio, along that southern boundary to its western extremity and thence in a straight line to the Pacific, passing by the southern extremity of a pond that has its outlet into the channel between Fort point and Point Lobos. The surveys and levellings to be minute at point José and to the distance of 800 yards south of it,—and at Fort point to the distance of 1200 yards around it inland. The soundings around the water boundary to show 1/2 fathom curves to the depth of 3 fathoms and fathom curves of 4 and 5 fathoms.

2d. From the southern boundary of Sausolito, by a line parallel to the channel of entrance, to the Pacific. The surveys and levellings to be made minute from Cavallo point westwardly along the ridge to Cavallo or Horse Shoe Cove, across that cove to a point which is nearest to Fort point on the opposite side of the channel and along the shore to a distance of 600 yards west of point Diablo toward the entrance of the harbor and 800 yards back from the line. The soundings around the water boundary to show 1/2 fathom curves to the depth of 3 fathoms and fathom curves of 4 and 5 fathoms.

3d. Soundings from and including the entrance of the channel and through it 600 yards above Sausolito cove at the north; the southern extremity of San Francisco city at the south; a line in a westerly direction around Yerba Buena Island not nearer to it than 600 yards; a line thence to the mouth of San Pablo bay and thence to a point 600 yards north of Racoon Straits. These soundings would include all the channels leading from the sea to San Francisco and San Pablo bay.

4th. Minute survey and levelling of the whole of Mare Island and a general survey and levelling of the land on the eastern side of Mare Island Straits, beginning at the high hills between those straits and the City of Benicia, about 2000 to 2500 yards from the former and extending on a line nearly parallel to it to a point opposite the northern extremity of Mare Island and thence to the straits so as to join them at a point about 800 yards north of the northernmost high land on the eastern side

of the straits. The soundings to show 1/2 fathom curves to the depth of 3 fathoms and fathom curves beyond that depth throughout the whole of Mare Island straits and also the entrance to them from the straits of Karquines; also of fathom curves to the distance of two miles west of Mare Island in the bay of San Pablo.

It is our duty to specify what extent of ground may be necessary for the public use in connection with the several objects we are expected to report upon officially and we think it proper our opinion should be stated without delay that the Govt. may have due time to act upon the matter.

We therefore recommend the reservation for public use of all the land embraced by the several surveys above specified together with Yerba Buena, Alcatrazes and Angel Islands in San Francisco bay. It is possible a portion of these lands may be dispensed with but that cannot be judged of until after the surveys shall be completed. It will be easier to relinquish what may not be needed than to get back what may have been prematurely given up.

As the accompanying sketch of the soundings in Mare Island straits does not show the topography it may be proper to state that it is in many respects decidedly favorable and in no respect unfavorable to the establishment of a naval depot on Mare Island. It may be proper also to state that vessels may reach the position from the sea without finding a less depth than 6 fathoms.

There will probably be recommended strong works near Fort point on the south side of the channel

and also on the north side of the channel nearly opposite to Fort point. There would be works of chief importance for the defence of the entrance to the harbor. Batteries at point José and on Alcatrazes Island would cooperate with the exterior works and altho' as auxilliaries they may be regarded as of secondary importance the value of the latter is far greater than that of the former and nearly equal to that of the works at Fort point and opposite to it. A temporary battery on Angel Island opposite Alcatrazes would cooperate with the latter in defending the approach to the bay of San Pablo by the south channel—and a temporary battery on Racoon point opposite Angel Island would defend the channel leading thro' Racoon straits to the bay of San Pablo.

We expect to sail for Oregon in the course of a week.

Respectfully submitted on behalf of the Commission by your obedient servant,

G. L. Smith
Bt. Col. and Senior Member

For the Secretary of War.

[Endorsed]:

S5627—6

San Francisco, Cala. March 31, 50.

2 Letters

Col. John L. Smith, Sen. Member Commn.

Reports their return from the Sandwich Islands—& of their examination of the Bay of San Francisco.

S128. Rec May 8, '50.

Engr. office

Engr. Dept. Rec'. May 21, 1850.

Recommends certain surveys and soundings to the reservation, for public use of all the land embraced by these surveys.

[Map accompanying this Exhibit omitted by stipulation of counsel.]

Mr. PECKHAM: We offer as Government's Exhibit "G" the report of the Sloat Board, to which are annexed two plans, 7 and 8, also exhibit notes and memoranda of the records of the action of the Sloat Board.

(The report of the Sloat Board, plans, exhibit notes and memoranda are received in evidence as "Plaintiff's Exhibit G".)

PLAINTIFF'S EXHIBIT G.

[Endorsed]: Filed Aug. 5, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

United States of America—Navy Department

I hereby certify that the annexed copy of report of the Board appointed to examine the shores and waters of the Bay of San Francisco, in California, for the purpose of selecting a site for a Navy Yard and Depot, dated November 6, 1852, is a true copy of the original on file in this Department.

In testimony whereof, I have hereunto set my hand and caused the Seal of the Navy Department of the United States to be affixt, at the City of Washington, this 14th day of July, in the year of

our Lord one thousand nine hundred and thirty-one, and of the independence of the United States the one hundred and fifty-sixth.

[Seal] C. F. Adams,
Secretary.

Navy Department, November 6th, 1852.

To the Honorable, the
Secretary of the Navy.

Sir:

The Board appointed to examine the shores and waters of the Bay of San Francisco in California, for the purpose of selecting a site for a Navy Yard and Depot, including a Naval Hospital and Marine Barracks, have performed the duty assigned them and have the honor to submit the following Report with plans:

No. 1—Plan of Rincon Point and Mission Bay with soundings.

No. 2—Ringgold's Chart No. 1, being a chart of the Bay of San Francisco.

No. 3—Ringgold's Chart No. 2, being a Chart of the Bay of San Pablo, Straits of Carquines and part of the Bay of San Francisco.

No. 4—Plan of Saucelito with soundings.

No. 5—Aspinwall Bay with soundings.

No. 6—Ringgold's Chart No. 3, being a chart of Suisun and Vallejo Bays.

No. 7—Plan of Mare Island showing the Topography of the land, and soundings through Mare Island Straits.

No. 8—Plan of part of Mare Island, showing the positions of the several proposed buildings and other improvements.

The Board left New York by the steamer of the 24th March last, and arrived at San Francisco on the 28th April following; there being no suitable vessel to San Francisco belonging to the Government, and the Naval vessels in port being unable to supply the wants of the Board, the most appropriate vessel which could be found was purchased without delay, and measures immediately adopted to effect such repairs and arrangements as were necessary for the service to be performed; and as these preparations would necessarily occupy some time, it was deemed a favorable opportunity to learn something of the resources of the country for furnishing such building materials, as would be required at the yard. Accordingly a portion of the Board made excursions into the interior, and the result of their enquiries will be found in another part of this report.

R. D. Cutts, Esqr., commanding the Schooner Baltimore, and attached to the Coast Survey, being in port, and having recently been employed in surveying some of the points which were to be examined, kindly furnished such copies of his work as were desired, and the Board are under great obligations to him, for his polite attention and the assistance derived, from the result of his labors.

The vessel having been properly fitted for the service, the examination was commenced at Rincon

Point and Mission Bay, and as the sketches of these points furnished by Mr. Cutts exhibited the Topography very clearly, the use of instruments on shore was deemed unnecessary; the Board however, made a careful personal examination of the ground, and sounded along the lines as indicated on Plan marked No. 1.—The two points being contiguous, were embraced in one examination, and the advantages and disadvantages which apply to the one, are generally applicable to the other.

In the letter of instructions from the Department the particular attention of the Board is directed to seven points of examination, the first of which is: Its security from attack by an enemy, and its facilities and economy for defence."

On this point it may be said that both Rincon Point and Mission Bay, and indeed the City of San Francisco itself are all at present exposed to the attack of an enemy, there being no fortifications capable of preventing a hostile fleet from entering the harbor and destroying the city. It is presumed however, that the entrance to this important Bay will soon be fortified, and then the only direction from which an attack could be made, would be from an enemy landing on the shore, at some points south of the entrance to the harbor. It is probable that there would be great difficulty in landing a large force on the beach, but the danger most to be apprehended would be sudden attacks from small parties, who might land and by a rapid march of some five or six miles, approach the yard,

fire it, and make good their retreat, without much hazard to themselves.

The plan of the City of San Francisco embraces both Rincon Point and the shores of Mission Bay, and it is presumed, that at some future day, when that portion of the city has been built upon, and valuable property accumulated in that quarter, measures will be adopted to guard against attacks from an enemy landing south of the entrance to the harbor, and when that is accomplished, Rincon Point and Mission Bay, would be protected, for an enemy could not approach them from the sea-shore without first passing through the city. At present however, the Board regards these points insecure from attack and incapable of defence, except at very heavy expense, the amount of which we are not able to estimate.

Second. "Its security from violent winds and sea, and the accommodations for safe anchorage in its adjacent waters." From Rincon Point to the south side of Mission Bay, there is good anchorage for vessels of heavy draft of water, but the whole line of shore is exposed to the southeast, from which quarter violent gales prevail during winter, heaving in a heavy sea, which breaks with great force along the shore, thereby endangering vessels at anchor and rendering it impossible for them to lay in safety alongside of wharves.

Third. "Its adaptation to the construction of a permanent stone dock, and for working a sectional dock in connection with a Basin and Railways, if a

Basin and Railways be practicable in those waters."

The appearance of the shore between high and low water marks, from Rincon Point to the north side of Mission Bay, would indicate a favorable foundation for a permanent stone dock, being of stone and hard gravel, the stone is of volcanic character and occasional strata of sand stone, neither of which would be suitable for building purposes, though the ledges would furnish a good foundation for the superstructure of a stone Dry Dock. For the working of a sectional or other floating dock, in connection with a basin and railways or otherwise, the Board regards this location as highly unfavorable; in addition to the want of protection from violent gales and heavy seas, the water near the shore is too shallow for the purpose, and the ground rising abruptly from the water to a mean elevation of about seventy feet, it would be impossible to obtain sufficient table land for the accommodation of the Basin, and Railways, without incurring an enormous expense. These remarks apply more particularly to Rincon Point; at Mission Bay there is not sufficient depth of water for the use of any kind of dock suitable for Naval purposes.

Fourth. "The facilities for procuring and the accommodation for boarding mechanics and workmen of various classes."

These sites are in the immediate vicinity, in fact within the limits of the largest city on the Bay, and therefore at present have an advantage over other places in the facilities for procuring workmen and

accommodations for them. We do not, however, regard this point as of great importance for in this country where towns and cities spring up as it were by enchantment, it is presumed that wherever the Government may decide to locate the Navy Yard, there workmen will soon concentrate and provide suitable accommodations for their comfort.

Fifth. "The facilities afforded for procuring most readily, materials, supplies and stores of all kinds."

The subject of building materials will be spoken of generally in another part of this Report. With regard to supplies and stores of all kinds, the sites in question being at a short distance from the business part of San Francisco, these articles could be delivered at them with great facility.

Sixth. "Its fitness and adaptation for the construction of piers, wharves, launching slips, and buildings ways, store houses for reception and keeping of various stores, marine barracks and hospital work shops of the different kinds required for the building and repairs of sailing and steam vessels of the Navy, and such dwellings for the officers attached to the yard as you may deem necessary."

Wharves and piers to be permanent must be constructed of stone, and the bottom furnishes a good foundation for walls, while the rock above water though unsuitable for building purposes, would supply an abundance of excellent material for filling in. This stone above high water is in a state of decomposition, and may readily be removed by a

pick. Ordinary wharves and piers however would afford no protection to vessels during the prevalence of southeasterly gales; as before stated, and as will be clearly seen on reference to plan No. 1 on which the topography and soundings are delineated, the ground is so elevated as to require an immense outlay, before it could be reduced to a proper grade for the construction and convenient use of buildings of any kind required in a Naval establishment, and in view of those considerations, the Board regards the sites under examination as unsuitable for a Navy Yard.

Seventh. "The effects of the Marine worms."

From information obtained from shipwrights and others employed along the shore, as well as from our personal observations, we are of the opinion that the existence of the marine worms and their destructive action in the harbor of San Francisco, are serious objections to that vicinity for the purposes of a great naval station.

After careful examination and much reflection on the subject, the Board cannot discover that Rincon Point and Mission Bay possess any advantages which should recommend or entitle them to serious consideration, as favorable sites for a Navy Yard; on the contrary there are many objections already enumerated, to which may be added the great danger to be apprehended from fire, by their close proximity to, and the position to leeward of the City of San Francisco, which is mainly of very combustible materials and which has already been

several times nearly destroyed by this devouring element.

Having concluded the examination of Rincon Point and Mission Bay, the Board next proceeded to explore the shores of the Bay of San Francisco, to a point nearly opposite the San Jose Mission and distant from San Francisco about twenty five miles. On the west shore there are many indentations which appear to present favorable sites, but upon sounding they were found to be too shallow for Naval purposes, none of them affording more than ten feet of water. Off Point Avisedera deep water was found near the shore as indicated on Ringgold's Chart No. 1; the land however is very high, and the same objections in regard to exposure which apply to Rincon Point, exist here. Along the whole west shore there is generally deep water near the projecting points, but opposite the Bays the three fathom line of soundings was found from one to two miles from the beach. This side of the Bay is accessible to an enemy from the sea shore; the channel though affording water for the largest ships is extremely narrow, and the prevailing winds during a large portion of the year, are adverse to the passage of vessels bound for sea. On the east side of the Bay the three fathom line was found from three to five or six miles from the shore, and within that line is an extensive shoal, as shown on the chart above referred to.

The result of this examination was such as to satisfy the Board beyond a doubt, that there is no

site on either shore of the Bay of San Francisco, south of the city, which possesses any advantages or recommendations, or where it would be practicable to construct a Navy Yard capable of supplying the wants of the service upon this extensive and important coast.

The Board then visited the Island of Yerba Buena, opposite the City of San Francisco. On the east side of this Island is a small bay exposed also to southeast gales, having from five to seven fathoms water, and good anchorage; the land is broken and elevated, being 300 to 500 feet above the sea, and there is no table ground suitable for the erection of buildings for Naval purposes. The Island possesses none of the requisites to recommend it as a proper or practicable site for a Navy Yard.

Clark's Point, or as it is called on Ringgold's Chart No. 2, Point Montgomery, is situated on the north side of San Francisco; there is deep water near the shore, and good holding ground, but the anchorage is much exposed and uncomfortable, the land is very high and precipitous, and there is nothing to recommend the location as on any account suitable for Naval purposes.

Saucelito on the north of the Golden Gate, and at the entrance to Raccoon Straits, as seen on Ringgold's Chart No. 2, is the point at which the provisions and stores of the Pacific squadron are now stored. The water in the Bay is deep, and there is good holding ground and anchorage for a large number of vessels, where they are well protected

from north, south and west winds, but are much exposed to east and southeast gales. The lands at Saucelito are much broken and very high, the amount at a moderate elevation being very inconsiderable and entirely inadequate for a Navy Yard. It may be attacked by an enemy landing on the coast, and would require a large outlay in fortifying the hills for its protection. Soundings were taken at this point, which with the topography of the country are shown on Plan No. 4. The approach to this place is at times very difficult, owing to the baffling winds caused by the broken and irregular high lands, and the rapid and varying currents through Raccoon Straits; here is a fine spring of excellent water from which all the shipping and many of the inhabitants of San Francisco obtain their supplies; it is on private property, and the water is sold at a high rate. As a watering place Saucelito may be considered valuable, but it is not regarded as possessing the requisites of a great Naval establishment.

Angel Island, east of Saucelito has deep water near its shores, but the land is so high and precipitous as to render it unavailable for useful purposes, except at Raccoon Cove, on the straits of the same name; this beautiful spot is entirely sheltered from all winds, has deep water and good anchorage, but the extent of water and available land is entirely too limited to render it worthy of particular examination for naval purposes.

There is an abundance of water throughout the the whole extent of Racoon Straits, but neither

shore presents any sites in the least degree favorable for a Navy Yard.

Aspinwall Bay, situated northwest of Angel Island, as seen on Ringgold's Chart No. 2, was next examined. At this place soundings were taken as indicated on plan No. 5; there is a sufficient depth of water with good holding ground and anchorage for a large number of vessels. This anchorage is exposed to the north, northeast and east winds, but otherwise sheltered. The land is generally high, with a small amount of table ground near the water; from the shore a flat extends to the deep water which could readily be filled in from the hills, and it is believed that a sufficient area could be obtained, to form an admirable site for a Navy Yard.

Being limited as to time under the estimate made by the Department, for the full completion of the work entrusted to us, and having before us the experience of a preceding Commission appointed for a like object; aided too by a topographical survey of the same by Mr. Cutts of the Coast Survey, we were induced to abandon this locality for the present, in search of one, that those two authorities seemed to concur in indicating as better adapted to our wants. With these views, under the above restriction as to time, reiterated by the Department under date of 30th April last, it seemed impossible to give detailed Hydrographical and Topographical surveys for the working plans of both, and hence a less minute examination of this point was made, than was perhaps under all the circumstances, de-

sirable; nevertheless the sequel will show, that we had not made a wrong estimate with regard to the site, that eventually most particularly elicited our attention.

Should the Department however, be unable to establish the title of the Government to Mare Island, or effect a satisfactory arrangement with those persons who claim to be its owners, the Board is of opinion that Aspinwall Bay is well worthy of a more thorough examination. From Aspinwall Bay through the Straits and Bay of San Pablo to the Straits of Carquines, there is a good channel way with sufficient water for the largest ships. The line of three and a half faths, except at points, is at a great distance from the shore, and where deep water approaches the shore, the land is high and in no place suitable for naval purposes; this passage will be seen on Ringgolds Chart No. 2. Through the Straits and Bay of San Pablo to the Straits of Carquines and Vallejo Bay there is deep water with a strong current; on the south side the channel approaches quite near the shore, but the lands are very high and the banks abrupt affording no space for any useful purpose; on the north side are Southampton Bay and Benecia and Navy Point.

Soundings were taken across the entrance to Southampton Bay, and along the east side towards Benecia; the water in the Bay is very shallow, indeed a large portion of it is bare at low tide. Opposite the east point of the entrance to this Bay, the channel approaches the shore and is very deep, but

the extent is small and the auchorage exposed to the strong winds which almost invariably draw through Carquines Straits; the land is high and unfavorable and the point possesses no advantages. Near the east end of Benecia the Pacific Mail Steamship Company has established its works, and are about erecting extensive foundries and workshops. This point was examined but no place could be found adapted to the wants of the Navy; the water is shallow near the shore, there being less than three fathoms at a distance of five or six hundred feet from the shore, while the currents were rapid and irregular, causing vessels to lay very uneasily at their anchors. Along the shore there is a large extent of tule land which has been sounded sixty feet before reaching hard bottom, while inside the tule, the land rises in high hills.

It is believed that Navy Point has been recommended as a suitable place for a Navy Yard, but the Board was unable to discover that it possesses any advantages except deep water near the shore. The anchorage is unsafe, the bottom being rocky, and the large body of water discharged from the Sacramento river and Suisun Bay, which is much contracted at this point, being at times forced with great violence into Vallejo Bay, causing vessels to drag or lose their anchors, and often exposing them to great danger of being thrown upon the rocks. The land rises almost perpendicularly from the shore to the height of from one to two hundred feet, rendering it totally unfit for any purposes without an immense outlay for grading. The locations of

the several points above alluded to, will be seen on reference to Ringgold's Chart No. 3.

The point which presents the most favorable appearance for the location of a great Naval establishment, is Mare Island, on the north of the entrance to Carquines Straits, and bounded on the east by Mare Island straits, which separates it from the city of Vallejo on the west by the Bay of San Pablo, and on the north by a large tract of tule land, extending several miles in the direction of the valley of Sonoma. The surface of this Island at the south end is broken and elevated, some of the hills rising to the height of 280 feet, but at the north end it is more uniform and may be easily reduced to a convenient grade. A careful survey of this Island and Straits has been made, and the soundings and elevations of the land will be seen on plan No. 7.

In reference to the security of this point from attacks by an enemy, and its facilities and economy for defence, the Board, as directed in their letter of instructions, called upon Capt. H. W. Halleck of the Engineers, by letter of 24th June, asking his opinion upon that subject. A copy of the letter with his reply, dated July 1st, 1852 is hereto appended. Mare Island is situated at the distance of about 20 miles from San Francisco, which latter point it is presumed will at an early day be protected by heavy fortifications on either side of the Golden Gate or entrance to the Bay. This done, the Island will be secure from attack in that direction, and at the present time it could be readily defended by field works upon the heights at the south end; the west

side could only be approached by small boats, that part of the Bay of San Pablo being too shoal to admit of the passage of large craft. It has been supposed that a landing might be effected at Bodega, distant about 60 miles, and this Island approached in that direction through the valleys of Napa and Sonoma; the Board is of opinion that there would be no difficulty in defending that quarter by slight works upon the hills in the rear of Vallejo, which command Napa Straits and the Island. On this point the Board concurs with Capt. Halleck in the opinion that "Mare Island is admirably calculated for defence, not only from its position, but also from its topographical character."

A slight inspection of Ringgolds Chart No. 2 will show how admirably vessels laying in Mare Island Straits would be protected from winds and sea, and plan No. 7 shows that there is a channel way for vessels of the largest class, at high water, or at afternoon low tide; the entrance of such vessels at the morning low tide would be difficult. The holding ground is good, and there is ample space for a large naval force to anchor in safety.

The whole substratum of this Island is believed to be of sand stone, and from appearances there is every reason to believe that building stone of excellent quality and in any required quantity may be obtained from the hills. There is no doubt of the practicability of obtaining an excellent foundation for permanent stone docks, and when the present prices for labor shall become somewhat reduced,

they may be constructed at a reasonable cost. Basins and railways can be constructed here if deemed expedient, and there is sufficient depth of water for the working of a sectional dock in connection with a Basin or otherwise.

At present there are no mechanics or workmen in the vicinity of Mare Island; Vallejo, the capitol of the State is distant less than a mile, but the population is very small and it contains no workmen of the description required at a Navy Yard. Should the Government commence a system of improvement there would probably be no more difficulty in procuring mechanics and other workmen at Mare Island, than at any other point, as these men naturally locate themselves where employment is to be obtained.

If Mare Island should be selected as the location for the Navy Yard, a small steamer would be necessary, as no supplies or stores can be at present obtained in the vicinity; with such convenience they could at all times be readily procured from San Francisco, the distance being less than two hours run. The erection of public works on Mare Island would doubtless impart an impetus to the growth of Vallejo, and in a short time all ordinary stores and supplies would be found there.

This point is well adapted for the construction of piers, wharves, launching slips, building ways, store houses and all other works appertaining to a complete and perfect Navy Yard, and it is believed that there is no site on or near the Bay of San Francisco which possesses so many of the requisite qualities.

That portion of the Island which it is proposed to occupy, lies at a moderate elevation, and the amount of necessary grading will be inconsiderable compared with that required at other points. There is deep water near the shore, the anchorage is good, and as the substratum is of rocks it will furnish good foundations for piers and other structures.

While at Mare Island straits, the Board had an opportunity of examining a wharf at Vallejo which had been built more than twelve months, also a buoy which had been about eighteen months upon Commission rock, and could find no evidence of the existence of the marine worms; from our own observations and the information derived from others, we feel confident in the belief that they do not exist in these waters. The water was tested on several occasions and found quite fresh.

Very careful soundings were taken throughout Mare Island Straits, the results of which will be seen on plan No. 7, from which it appears that there is an ample depth of water for ships of the largest class. The basis for tidal reductions, was a series of observations of all the high and low waters during one lunar month. The tides exhibited so unusual a difference between the heights of successive low waters, as to make it inadmissible to take a mean of them as a plane of reference, and instead, the extreme low water observed, was taken as the plane to which all the soundings were reduced.

If the mean of all the low waters observed between 6 a. m. and noon be taken as zero, the mean of all the low waters observed between 6 p. m. and mid-

night, would be 3.88 feet higher, whilst the mean rise and fall of tide was only 4.75 feet and the extreme 9.10.

With so wide a difference between the heights of low waters, it is plain the best reduction was to the extreme low water observed; or 2.83 feet below the mean of all the low waters; this was adopted, and consequently at mean low water there will be actually nearly three feet greater depth of water than the plan shows. The high waters occurring also between six a. m. and noon, and those between six p. m. and midnight, exhibit also a difference, giving the latter the greatest height by one foot and four tenths.

The velocity of the current about the time of spring tides as ascertained by several days observation was three marine miles per hour, and the general set, parallel to the shore.

Near the centre of the straits there is a sand stone ledge, a portion of which is bare at low tide, and upon this ledge it would be advisable to erect a beacon, or if deemed desirable, it could be removed. Between the ledge and the Island there is at high water a channel way for ships of the line. In making the soundings the bottom was generally found to be a stiff clay or soft mud, rock being found in but few places, as marked on the plan. Lines of levels were taken upon the land, and the elevations will be seen on plan No. 8. Along a part of the front of the Island there is a strip of tule land upon which borings were made to ascertain the nature of the bottom. The first was made on line

No. 30, plan 8, near the outer edge of the tule, and hard clay was found at the depth of 23 feet below the surface; after boring through 6½ feet of this clay, sand stone was reached at 29½ feet below the surface of the tule, which is generally 67/100ths of a foot above ordinary high water. The next boring was on line 26, same plan, near the outer edge of the tule; hard clay was found at 21½ feet and rock at 27½ feet below the surface. The third trial was made on line No. 22, and hard clay was found at 20 feet, through which the auger penetrated 8 feet, when its further progress was arrested by sand stone. The fourth boring was on line No. 18 where hard clay was met at 18 feet and the sand stone at 27 feet below the surface of the tule. These borings occupying a large extent of the tule, presenting very uniform results, it was deemed unnecessary to extend the examination further, it being evident that the tule land was a mere deposit of inconsiderable depth upon a foundation of rock.

The result of our examinations is such as to satisfy us beyond question, that Mare Island is the most eligible site for a Navy Yard within the waters of the Bay of San Francisco, or its vicinity. The surface of the land is favorable to the erection of buildings; there is ample depth of water for working of permanent stone or floating docks, and good safe anchorage with abundant space for a large number of ships of war to lie in safety. The only serious difficulty is the absence of fresh water on the Island; this deficiency may be supplied by the construction of a suitable number of cisterns to receive

and retain the rain water during the rainy season, and a steam water tank would be required, to supply the vessels from the river above Benecia. Under all the circumstances we therefore recommend its adoption as the most judicious selection which can be made, and have accordingly prepared a plan for its improvement.

Mare Island contains, including the tule opposite Vallejo, about 900 acres, all of which it is desirable that the Government should possess, though it is not proposed to occupy the whole of this large area for the Yard. A portion will be required for Hospital, Magazine, Barracks and Coal Depot, while the high land at the south end can be used for grazing Government stock and may be advantageously occupied by works of defence.

In view of the great and increasing importance of our commerce on the Pacific coast, and the remoteness from all other Naval Stations, the Board has deemed it proper to present a plan for a Navy Yard on an extensive scale, providing all the conveniences and accommodations requisite for building and equipping large fleets of steamers as well as sailing vessels, when the exigencies of the country shall require their presence in those waters.

Plan No. 8 presents the arrangements proposed; the line of wharf front is in deep water, there being generally a sufficient depth for the largest ships of the line to lie in safety; this line is in the direction of the current, and extends the whole length of the island, a distance of about two miles. In accordance with the letter of instructions we have located

a site for a Basin and Railway, for the floating dock, sites for a stone Dry Dock, and two ship-houses with launching ways; work shops and timber sheds are placed conveniently near the docks and ship houses, and a wet Basin with eight additional docks is located where vessels in ordinary may be laid in safety. The foundry and workshops necessary for the construction and repair of steam engines and other machinery, with the anchor and chain cable shops are placed at the north end of the yard to leeward of all other buildings, and contiguous to the water. Store houses for provisions and other stores are located centrally and near the water; suitable dwellings for officers are proposed, as it will be difficult, if possible, for them to procure accommodations elsewhere; spaces are marked out for the Marine Barracks, Hospital and Magazine, and it is believed that the arrangements generally will be found such as to afford great facilities for the execution of the public work and abundant accommodations for all the demands which may be made upon this yard, for many years to come.

As before stated, while the vessel was preparing for the surveys, the Board conformably with its letter of instructions, made an excursion into the country, for the purpose of learning something of its resources for the supply of building materials. At Sacramento City the party separated, one portion ascending the river about one hundred and twenty miles to Colusa, while the other explored the country in the direction of Marysville, Grass

Valley, Auburn, and the north fork of the American river.

Along the banks of the Sacramento above the Feather river, there is a very heavy growth of oak timber; many of the trees are of immense size, and shapes admirably adapted for ship building, but upon examination the timber was found utterly worthless for any purpose except firewood, and very inferior for that; wheelwrights and others who use oak timber, stated that the oak of the country had neither strength nor durability, and that it was not used except for firewood. About forty miles from Colusa, yellow and white pine with red wood of excellent quality was said to be found in great abundance, but its distance from water would render it impossible to get it to market at present, at a reasonable cost. In the vicinity of Amadore, about fifty miles from Sacramento towards the interior, there is a species of bastard live oak, which is said to be strong and durable timber; the trees are all small and unsuitable for ship building. White and yellow pine are found in this neighborhood of good quality, but too distant from water courses to be available.

Within a few miles of Grass Valley, in Nevada county, pines, both white and yellow, become common and are of large size; both varieties differ in foliage and fibre from the ordinary pines of the Atlantic coast. One variety will yield abundantly pitch, tar and turpentine, from the appearance of scarified trees. Near Greenhorn creek, pines of five feet diameter as well as red wood timber were

found in great abundance. For the present, this timber for naval purposes would be useless, except for tar &c it being too distant from any stream of sufficient size to transport it to a market.

In the vicinity of Auburn, near the North fork of the American river, the country abounds in excellent white and yellow pine timber, and to the foot of the Sierra Nevada range the country is covered with excellent pine, red wood and fir timber.

The North fork is a stream of ample size during the rainy season, to "run" logs, cut upon its banks, upon which, and the country adjacent, there is an abundant supply. For the present, owing to the high price of labor, the timber could not be obtained as cheaply as from Oregon, and other parts of California; it is nevertheless available if a necessity for it should exist. No oak timber of any value for building purposes is to be found in this section.

The principal growth of timber immediately contiguous to the Bay of San Francisco, is the red wood, a species of cedar, soft and unfit for ship building, but an admirable material for all constructions on land, where great durability rather than strength is required; for piles, wharf timber and many other purposes it would be excellent.

Some thirty miles towards the head of the Bay there is said to be large tracts of oak of two varieties; one is an evergreen, resembling the live oak, the wood tough and of large fibre, but the trees are small and not suitable for naval purposes, except that they might furnish good knees. The other species somewhat resembles the pasture oak

of the eastern states, but this timber is of little strength, and can scarcely be considered valuable for building purposes.

Although California seems to be deficient in good timber for ship building, it is believed that an abundant supply may be obtained from Oregon. Large tracts of excellent oak timber are said to be found near the head waters of the Columbia river, which can easily be rafted to navigation. There are two varieties of fir, found in great abundance on the coast; the red, which in California is usually called Oregon pine, is not considered a superior timber for any purpose, but the yellow fir is much better, being free from knots, wind shakes &c and an excellent timber for heavy girders and joists, and would probably answer for deck plank. Besides these there is an excellent quality of spruce, very white, clear of knots and strong; the trees grow to an immense size, and will make valuable spar timber.

At Monterey and several other points on the Coast, are large tracts of a species of hard pine which yields turpentine in abundance. The Board is of the opinion that the timber resources of the country may be greatly increased by the planting of locust, chestnut and walnut, and any other ship timbers which will grow in this climate. The country generally, it is believed, is favorable to the growth of chestnut and locust, and much Government domain might be advantageously appropriated to this purpose.

The Board would also recommend to the Department, the speedy introduction of hemp into California, as the indigenous hemp of the country, is of good, fine, long fibre, and very strong.

This country abounds in sand stone, which is found in many places, of excellent quality; in the vicinity of Benecia a quarry has been opened which yields a very fair stone, and one on the west side of the entrance to Southampton Bay is now worked, which furnishes stone of excellent quality, which is used extensively in San Francisco. This quarry is in the hands of a company who contemplate erecting steam works and machinery for cutting and dressing the stone. On Mare island there is an abundance of sand stone, probably as good as any in the vicinity. A very hard sand stone is found in great quantity at Angel Island, also at Yerba Buena, which is now much used in San Francisco for foundation walls to heavy buildings.

Lime stone of excellent quality and in immense quantities, is found at Monte Diablo and at Santa Cruz. The stone from Monte Diablo produces a fine specimen of lime which is now extensively used in San Francisco and highly approved. Near Santa Cruz a very good marble is found in abundance, which will probably in a short time be introduced as a building material. Clay for making bricks, is abundant, and the brick yards at Benecia and other points in the vicinity, furnish bricks in great quantities of good quality for rough work.

As soon as the Board became satisfied of the superiority of Mare Island for a Naval Station, ap-

plication was made to the District Attorney to ascertain in whom the title to the Island was vested; this investigation occupied some time, and it was only as the Board was on the eve of leaving California, that the papers relating to the title were received. In the meantime having learned that the Island was claimed as the property of Capt. G. W. P. Bissell, W. H. Aspinwall, and the heirs of the late Lieut. MacArthur, letters were addressed to Capt. Bissell and Doctor Bowie as the representative of Lieut. MacArthur's heirs, asking the terms upon which the property could be purchased. These letters together with their answers, and other correspondence which ensued, as well as copies of the deeds, conveyances, etc. accompany this Report and are marked from A to N.

In the examination of these last, great doubts have arisen as to the legality of the original provisional grant made by Governor Jimeno to Victor Castro in 1840, and the fee simple granted by Governor Alverado, to the same, May 20th, 1841 and upon which are founded the rights of the present claimants. This deed sets forth that by authority vested in him (Alverado) he secures this Island to Castro and his heirs. It does not appear that any consideration monies have been paid for the same or consideration further demanded, than compliance with some formulae of law of which we know nothing.

The right of the Governor to make a conveyance in any form, is not apparent to us; on the contrary,

we are informed by gentlemen of the law, and other residents of California, presumed to be cognizant of the fact, that the central Mexican Government under a law inherited from its Spanish ancestry, reserved to its own use all headlands and islands in navigable waters for the purposes of defence &c. The facts in both cases, to wit: As to the right of Governor Alverado to convey public domain by fee simple, and the existence or non-existence of the law above referred to, it is presumed might best be ascertained by reference to the public archives of the Mexican Government.

The Board does not presume after the legal investigation had by its orders in California, to offer any opinion against such authority, that may have any great weight; still as these suggestions have been so frequently and so pointedly put before us, we cannot but deem it our duty to state, that we view with great caution, the legality of this chain of titles, and recommend, before any consummation of a purchase that a strict examination of the same be instituted.

It is proper to state, that in addition to the claimants above alluded to, there are several squatters already on the Island and holding possession. These persons stated, if the Government should claim the title to the Island, they would at once retire, but declared their determination to defend their titles against the claims of any individuals.

In concluding this Report, the Board cannot refrain from an expression of approbation of the prompt and efficient manner in which the duties

assigned to Lieut. Ammen and Act. Master Jackson have been performed by those officers.

All of which is respectfully submitted by your obedient servants.

John D. Sloat
Wm. S. Ogden, U. S. N.
Commissioner
Simon Mason Blunt, Lt. U. S. N.
W. P. S. Sanger, Civil Engineer

Washington City, D. C.
Nov. 6th, 1852.

U. S. Brig Major Eastland
San Francisco Bay, June 24, 1852

Sir:

The Board of Naval Officers for the establishment of a Navy Yard and Depot in these waters, request that you will, as soon as possible, examine and inform them in whom is vested the true title to Mare Island.

The instructions from the Department to the Board are such as to require that your action should be as early as possible.

You will regard this communication as confidential.

Very respectfully
J. D. Sloat
Senior Officer of the Board

To
Calhoun Benham Esq.
U. S. District Attorney,
San Francisco, Cal.

U. S. Brig Major Eastland
San Francisco Bay, June 24, 1852

Sir:

The Board of Naval Officers for the establishment of a Navy Yard and Depot in these waters have been instructed to call upon you in relation to the military defence of such places as may otherwise be deemed favorable by them.

They request that you will give them your counsel in writing upon the capabilities, and the best plan of defence of Mare Island, as soon as may be practicable.

Very respectfully
J. D. Sloat
Senior officer of the Board

To
H. Wager Halleck
Capt. U. S. Engineers.

San Francisco, California
July 1st, 1852

Com J. D. Sloat
Senior officer of the Board &c &c

Sir:

Your communication of June 24th asking "my opinion" upon the capabilities, and the best plan of "defence, of Mare Island" has been duly received.

In reply I would most respectfully state, that in my opinion all military works erected for the de-

fence of the Bay of San Francisco, should be located exterior to Mare Island and that any Barracks, Depots &c erected on that Island will be entirely within the line of fortifications and consequently perfectly secure from attack by a maritime force.

With respect to "the best plan of defence of the Island" itself, I can give no details of such "plan" without a more critical examination of the topography of the Island and of the soundings in its vicinity. I suppose however, that, at the present time, you only wish an opinion in general terms; and, from an acquaintance of many years with all the grounds in that vicinity, I feel prepared to say with much confidence, that Mare Island is admirably calculated for military defence, not only from its position, but also from its topographical character.

Very respectfully
Your obt servt
H. W. Halleck
Bvt. Capt. U. S. Engineers.

U. S. Brig Major Eastland
San Francisco Bay July 23rd 1852

Sir:

The Board of Officers for locating a Naval Depot, having ascertained that the greater number of shares of Mare Island are vested in you, and being authorized to make a conditional purchase, subject to the satisfaction of the Secretary of the Navy, ask

you to give them in writing the conditions under which you are willing to sell your interest to the United States.

Very respectfully

J. D. Sloat

Senior Officer

G. W. P. Bissell Esq.

San Francisco, Cal.

A letter of like purport was also addressed to Dr. A. J. Bowie, representative of a supposed ownership of some shares.

San Francisco July 24 1852

Sir:

In answer to your letter dated the 23rd instant, I beg to say that I will sell my interest in "Mare Island" subject to the condition named, at the following rate, viz—$250 Two hundred & fifty dollars per acre, for that portion of the "Island" lying south of the main body of the tule or low ground and $50 Fifty dollars per acre for that portion lying north of the high or dry land, the first supposed to contain about nine hundred acres and the last about thirteen hundred acres.

Should you require the use of the "Island" before you can communicate with the Secretary of the Navy, a rent of $2000, two thousand dollars per month will be charged, with the proviso, that if the sale is approved of within three months from the date of the contract there will be no charge for rent.

Immediate possession of the whole Island can be

given, referring to the enclosed letter from Doctor Bowie relating to the interest he represents.

I am respectfully
Your obt Servt
G. W. P. Bissell

To Comn
John D. Sloat
Sen officer of the Board for
locating a Naval Depot
San Francisco.

San Francisco, July 24th, 1852.

Sir:

In reply to your letter asking the conditions upon which I am willing to sell the interest I represent in Mare Island, I have to state that the terms offered in the accompanying note from Mr. Bissell viz. two hundred and fifty dollars per acre, for the upland and fifty dollars for the tule will be accepted by me, subject however to ratification by Mrs. McArthur, as my power of attorney (although intended so) does not in the opinion of Chitwood & Co. confer fully the right to convey real estate.

I am very Respectfully etc.,
A. J. Bowie.

Com. Jno. D. Sloat, U. S. N.,
Senior officer of the Board.

U. S. Brig Major Eastland,
San Francisco, July 26th, 1852.

Sir:

The Commission appointed by the Honble Secretary of the Navy for the purpose of selecting a

site for a Navy Yard in these waters, has received your letter of the 24th inst. in reply to one of the 22nd of the same month in which you are requested to state the terms on which you would sell to the Government your interest in the locality known as "Mare Island."

The Commission takes leave to inform you that your proposition will be laid before the Honble Secretary of the Navy for his action, and regret to be obliged to add that its sense of duty will compel it in view of the vast disparity in prices asked, between this Island and other adjacent lands, and in view too of the estimate of its value as very recently held by its late proprietors, together with other considerations which need not be mentioned to recommend that the interests of the United States would not be served by becoming its purchaser.

Respectfully,

J. D. Sloat,

Senior officer of the Board.

To G. W. P. Bissell, Esq.,
San Francisco, Cal.

San Francisco, July 26th, 1852.

Gentlemen:

I have just had the honor to receive your communication in reply to my proposition to sell to the United States "Mare Island" for a Naval Depot under date of the 24th inst. In entering upon a negotiation with the Commissioners at their request, I did not intend to preclude them (if my proposi-

tion should not be accepted) from making on their part such an one as they should deem it for the best interests of the Government to approve of, nor to have them consider the offer on my part as an ultimatum, and I now respectfully invite the Commissioners to name the sum that would be in accordance with their views, or to state if any other proposition from me will be entertained.

Respectfully,

Your obt servt,

G. W. P. Bissell.

Com. J. D. Sloat and officers forming the Board for selecting a Naval Depot, &c., &c.

U. S. Brig Major Eastland,
San Francisco, July 27th, 1852.

Sir:

In answer to your communication of yesterday's date, the Commission have to state, that it is not disposed to offer any proposition for the purchase of the land alluded to in that communication, other than an invitation to the proprietors to present their terms of sale. If you deem it advisable to make any further proposals as an ultimatum the Commission will give it its respectful consideration.

Respectfully,

Your obt servt

John D. Sloat,
Senior officer of Board

To

G. W. P. Bissell, Esq.,
San Francisco, Cal.

San Francisco, July 7th, 1852.

Gentlemen:

I have the honor to acknowledge the receipt of your letter of this date, in reply to my communication of yesterday inviting the board to propose such terms as they should deem fit for the purchase of "Mare Island."

The Commission states "that it is not disposed to offer any proposition for the purchase of the land alluded to in that communication other than an invitation to the proprietors to present their terms of sale," being desirous that the government should not be disappointed in the possession of a place the Commission may deem most suitable to their purposes, and having reconsidered the matter and consulted with Doc Bowie who is interested in the Island, I now propose to sell our interest at the rate of $160,000 one hundred and sixty thousand dollars for the whole Island. Should the Board accept this proposition and close the contract here (subject to the approval of the Government within three months) immediate possession will be given and no charge for rent. Should however the board deem it not advisable to close the matter on these terms, I will empower Mr. W. H. Aspinwall of New York to negotiate with the Hon. Secretary of the Navy, and to arrange in Washington the whole matter on such terms as they shall mutually agree upon there.

I remain
Respectfully,
Your obt servtv,
G. W. P. Bissell.

To Com. J. D. Sloat and officers composing the Board for locating a Naval Depot, San Francisco.

U. S. Brig Major Eastland,
San Francisco, July 28, 1852.

Sir:

Your letter of the 27th inst has been received and the Board feeling that the terms you there propose are much higher than should be asked for the property in question, will not enter into any purchase but prefer laying the matter and your propositions before the Navy Department, with the same recommendation as is contained in their letter to you of the 26th inst.

Respectfully,
Your obt servt
J. D. Sloat,
Senior officer of the Board.

To
G. W. P. Bissell, Esq.,
San Francisco, Cal.

San Francisco, July 29th, 1852.

Gentlemen:

I duly received your letter of yesterday wherein you say that you decline the purchase of "Mare Island" here, but will lay the whole matter before the Navy Department.

On looking over my letter to you of the 27th inst, I notice that I was not sufficiently explicit in that part of it where I speak of charging no rent. My meaning was, to offer the "Island" to the Government free of charge and without regard to future

negotiations for its purchase, for such reasonable time as they may require it.

Very Respectfully,

Your obt servt,

G. W. P. Bissell.

Com. J. D. Sloat and officers composing the Board for locating a Naval Depot, San Francisco.

United States of America—Navy Department

I hereby certify that the annexed copy of Plan entitled "Plan for a Navy Yard at Mare Island, California" is a true copy of original plan No. 7 accompanying the report of the Board of Officers appointed to select a site for a Navy Yard in the Bay of San Francisco, California, dated November 6, 1852, on file in this Department.

In testimony whereof, I have hereunto set my hand and caused the Seal of the Navy Department of the United States to be affixt, at the City of Washington, this 14th day of July, in the year of our Lord one thousand nine hundred and thirty-one, and of the independence of the United States the one hundred and fifty-sixth.

[Seal] C. F. Adams,

Secretary.

[Maps and Plans accompanying this Exhibit are omitted by stipulation of counsel.]

United States of America—Navy Department

I hereby certify that the annexed copy of a rough journal of the Board of Naval Officers appointed to

select a site for a Navy Yard on the Pacific Coast, showing a record of its proceedings from September 30, to October 23, 1852, both inclusive, is a true and literal exemplification of the record on file in this Department.

In testimony whereof, I have hereunto set my hand and caused the Seal of the Navy Department of the United States to be affixt, at the City of Washington, this 14th day of July, in the year of our Lord one thousand nine hundred and thirty-one, and of the independence of the United States the one hundred and fifty-sixth.

[Seal] C. F. Adams,
Secretary.

Rough Journal of the Naval Board in session at Washington, for completing their work upon the Bay of San Francisco, Cal.

Thursday, Septr. 30th, 1852:

The Board met according to appointment in the "Windee Building." All the members were present, namely: Com. J. D. Sloat, Commander Wm. S. Ogden, Lieut. S. F. Blunt and Wm. P. S. Sanger, Civil Engineer, also Lieut. Danl. Ammen and Acg Master A. C. Jackson, attached to the Board.

A letter directed to Com. Sloat from the Honble Secy. of the Navy, was read, bearing date the 20th of Sept. It referred to the Report to be made by the Board and called attention to the 3rd section of an enclosed Navy Appropriation Bill which was also read.

The Board discussed the plan of Mare Island and it was determined that a working one of one inch to the hundred feet should be made of the northwest part of the island and embracing as much of it as possible.

The Board discussed the subjects and generally the subject matter to be embraced in the body of the Report to be made to the Navy Department.

At half past twelve the Board adjourned.

Friday, October 1st:

Application by letter was made to the Secy of the Navy for the employment of a draftsman.

The subject discussed was the number of drawings and plans to be embraced in their Report. The following were deemed necessary:

1. Rincon Point and Mission Bay.
2. Saucelito.
3. Yerba Buena.
4. Raccoon Straits and Angel Island.
5. Aspinwall Bay.
6. Mare Island (general plan)
7. Mare Island 2nd plan (A)
8. do 3rd do (B)

At 1 the Board adjourned.

Saturday, October 3rd:

The Board met at 10 a. m. and there being nothing proposed for discussion, adjourned, to meet at the same hour on Monday.

Mr. Jackson employed in making the skeleton plan of Mare Island for projecting the improvements.

Monday, October 4th:

The Board met at 10 a. m. and nothing being proposed for discussion, adjourned. Mr. Jackson employed in making the skeleton plan of Mare Island.

Tuesday, October 5th:

The Board met at 10 a. m. and adjourned, there being nothing proposed for discussion. Mr. Jackson employed upon the skeleton plan of Mare Island.

Wednesday, October 6th:

The reply of Com. Skinner, Acg. Secy. of the Navy to a letter of Com. Sloat bearing date Oct. 1st, was received. It acceded to the request of the Board to employ a Topographical draftsman whose pay was not to exceed three dollars per day.

The Board met at 10 a. m. and nothing being proposed for discussion, adjourned. Mr. Jackson employed upon the working plan of Mare Island.

Thursday, October 7th:

The Board met at 10 a. m. and adjourned there being nothing proposed for discussion. Mr. Jackson employed in making the working plan of Mare Island.

Friday, October 8th:

The Board met ~~at 10 a. m.~~ and adjourned, there being nothing proposed for discussion. Mr. Jackson employed upon the working plan of Mare Island.

Tuesday, October 19th:

The Board met at 10 a. m. and discussed the manner of building the line of wharf and also deter-

mined that it should be straight and built as per plan between "T No. 12 and "H No. 54", forty two hundred feet in length. The location for floating Dry Dock was discussed also, but no place was determined upon. At one o'clock the Board adjourned.

20th:

The Board met at 10 a. m. The location of the floating Dry Dock and Basin and railway (if one be built) also the permanent Stone Dock and two ship houses were determined upon.

21st:

The Board met at the usual hour and were employed upon locating the improvements of the yard generally. The draftsman making smooth plans of the Surveys made.

22nd:

The same.

23rd:

The same.

Mr. PECKHAM: We offer in evidence letter from Secretary of the Navy, dated February 9, 1853, requesting the reservation of Mare Island and President Fillmore's notation thereon, reserving Mare Island.

(The letters of February 9, 1853 and February 12, 1853, are received in evidence as "Plaintiff's Exhibit "H".)

PLAINTIFF'S EXHIBIT H.

[Endorsed]: Filed Aug. 5, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Washington

July 10, 1931.

I hereby certify that the annexed copy of Executive Order, dated February 11, 1853, is a true and literal exemplification of the original on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] D. K. Parrott,
Acting Assistant Commissioner of the General Land Office.

Recorded in the California Letter book, 16 Feby., 1853.

JMM 1361756-1

Navy Department

February 9th, 1853.

Sir:

By the 3rd Section of the Act of last session, Chapter CIX Statutes at large, making appropriations for the Naval Service, the Secretary of the

Navy is "authorized and directed to select a site for a Navy Yard and Naval Depot in the Bay of San Francisco, in California or neighboring waters either by purchase or reservation of Public Lands."

I have the honor to inform you that acting in pursuance of this authority, I have it in contemplation to select Mare Island, in the Bay of San Francisco as the site for the Navy Yard and Depot referred to in the above act.

Negotiations have been in progress for the purchase of this island and its appendages for some time past. An investigation of the title which has been offered to the United States by those claiming to own this island, has led to some doubt whether the Government does not already possess the paramount right to the occupation and use of the island. My own opinion is that whether the title shall be found to exist in the United States or not, it is proper that the Government should reserve the land for public use and thus assert a title which will, at least, serve to strengthen any other which may ultimately be purchased.

The Act of Congress above referred to authorizes the reservation, if it may be thought expedient to make it, in case this land should belong to the public domain.

I have therefore respectfully to ask, if you should concur in the propriety of making the reservation, that you will be pleased to give the necessary orders to that end, and direct that the tract of land in the Bay of San Francisco bounded by the Bay of San

Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island, and the harbors, waters and anchorages connected therewith and necessary to the use of the same, be reserved to the United States for public uses.

You will find accompanying this note a map or chart of the said tract called Mare Island, which will indicate its position in the Bay of San Francisco and the waters connected therewith.

I have the honor to be, with the highest respect,

Your Obt. Servt.,

John P. Kennedy.

To the President.

Received and Posted in Vol. 55, p. 34. Nov. 24, 1923. A. E. "O."

Washington, February 11, 1853.

The Reservations above recommended are hereby made and the Secretary of the Navy will communicate that fact to the appropriate Department, that the Reservation may be properly and legally recorded.

Millard Fillmore.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Washington

July 10, 1931.

I hereby certify that the annexed copy of letter, dated February 12, 1853, filed under Mare Island Naval Reserve, is a true and literal exemplification of the original on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal]

D. K. Parrott,
Acting Assistant Commissioner of the
General Land Office.

Recorded in the California Letter book, 16 Feby., 1853.

JMM 254852-1a

Navy Department
February 12th, 1853.

Sir:

I have the honor to enclose herewith a letter addressed to the President from this Department under date of the 9th inst. asking him to give the necessary orders and to direct that the tract of land in the Bay of San Francisco, bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of Tule or Marsh land ordinarily re-

puted to belong to said island, and the harbors, waters and anchorages connected therewith and necessary to the use of the same, be reserved for public uses; And the President having made the reservation and instructed me to "communicate that fact to the appropriate Department, that the reservation may be properly and legally recorded" as will appear by his order of the 11th instant added by him to the letter from this Department herein before mentioned I respectfully request that the necessary order and notice may be given to effect the reservation of the said tract of land, known as Mare Island, in the Bay of San Francisco in California, and that this Department may be advised when the necessary forms shall be completed.

I have the honor to be

Very Respectfully,

Your Obt. St.,

John P. Kennedy.

Hon. A. H. H. Stewart,
Secretary of the Interior.

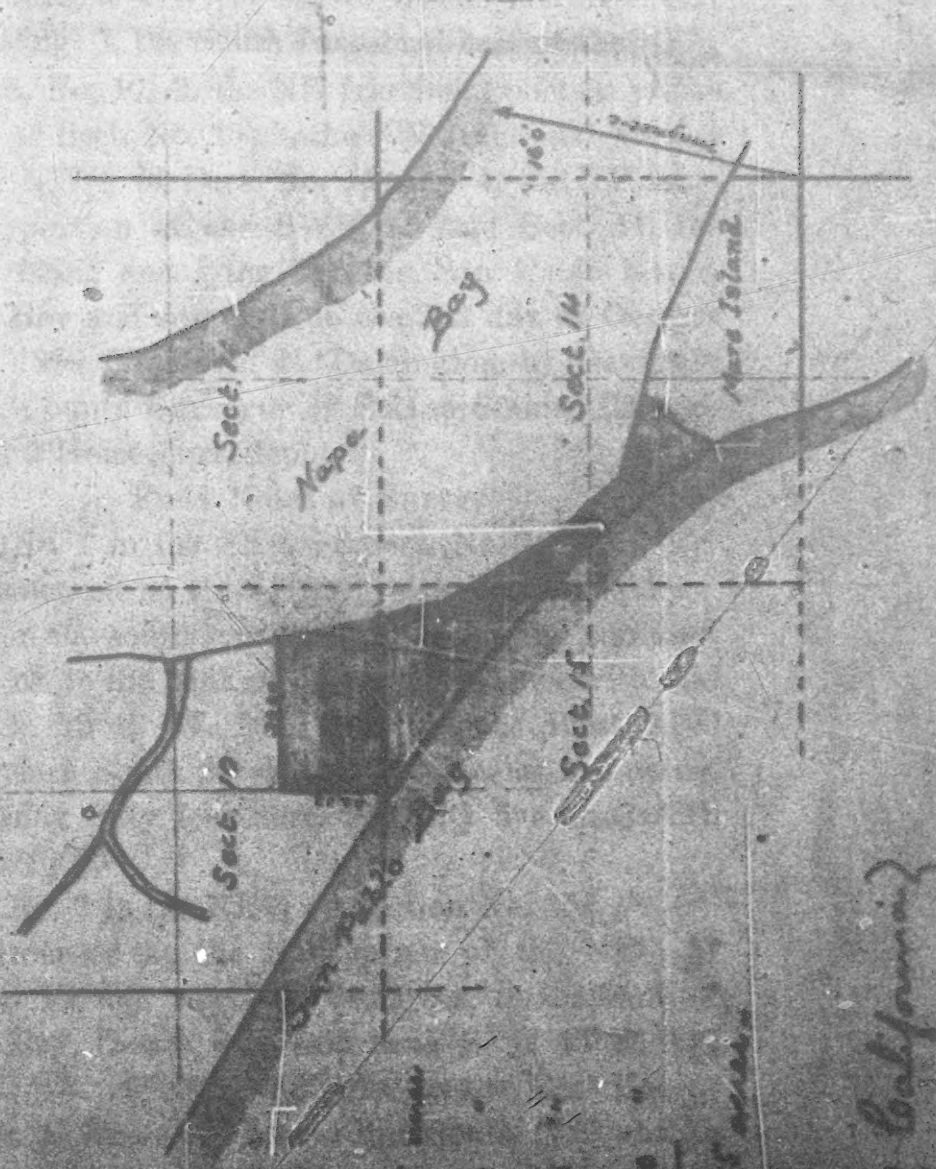
Mr. PECKHAM: We offer at this time from the record in Sawyer vs. Osterhaus case a certified copy of the Darlington Survey by Heindcourt.

(The certified copy of the Darlington Survey is received in evidence as "Plaintiff's Exhibit 1.")

PLAINTIFF'S EXHIBIT I. 384

[Endorsed]: Filed Aug. 5, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.



State of California,
County of Solano.

Survey No. 34 of Swamp and Overflowed lands in T. 3 N. R 4 W. of Monte Diablo meridian and base being: 1. the South fractional half of the SE¼ of Sect. No. 10; 2. the NE fractional portion of the NE¼ of Sect. No. 15; 3. the SW fractional portion of the NW¼ of Sect. No. 14; and 4. the NE fractional portion of the SW¼ of said Sect. 14, the whole being and lying between San Pablo Bay & Napa Bay and surveyed on the 2nd day of October A. D. 1856 for David N. Darlington, by David P. Wade, County Surveyor of Solano County through Em A. d'Hemecourt, deputy.

Field Notes of Survey.

Tract No. 1 in the SE¼ of Sect. No. 10:

Commenced at the ¼ Sect. stake on the ¼ Sect. stake on the south line of said Section and run East 34.55 chs. to the bank of Napa Bay; thence with said bank N. 12°45′ W. 20.51 chs.; thence West 30.00 chs. thence South 20 chs. to the place of beginning, containing sixty four acres and fifty five hundredth (64 55/100).

Tract No. 2 in the NE¼ of Section No. 15:

Commenced at the NW corner of the NE¼ of Section 15, and run East 34.55 chs. to the bank of Napa Bay, thence with said bank S. 12°45′ E. 9.17 chs. and S. 26° 0′ E. 7.82 chs. to the East line of Section 15 thence with said line South 17.37 chs. to the bank of San Pablo Bay, thence with the bank of said bay N. 45°0′ W. 6.62 chs. and N. 51°30′ W.

21.00 chs. and N. 54°30′ W. 19.00 chs. and N. 56°45′ W. 4.08 chs. to the ¼ section line thence with said line North 2.33 chs. to the place of beginning, containing Sixty two acres and forty hundredth (62 40/100).

Tract No. 3 in the NW¼ of Section 14:

Commenced at a point on the west line of said section distant 6.66 chs. North of the SW corner of the NW¼ of said section and run North 17.37 chs. to the bank of Napa Bay, thence with said bank S. 26°0′ E. 16.75 chs. and S. 43°10′ E. 12.30 chs. to the ¼ Sect. line thence with said line West 9.09 chs. to the bank of San Pablo Bay, thence with said bank N. 45°0′ W. 9.42 chs. to the place of beginning, containing thirteen acres and one tenth (13 1/10).

Tract No. 4 in the SW¼ of Section No. 14:

Commenced at a point on the E. and W. ¼ Section line in said Sect. distant 6.66 chs. East of the West line of said Section and run East 9.09 chs. to the bank of Napa Bay thence with said bank S. 43°10′ E. 8.78 chs. and S. 75°50′ E. 16.92 chs. to the base of the high land; thence with said base S. 42°30′ W. 10.00 chs. and S. 30°30′ W. 7.00 chs. to the bank of San Pablo Bay; thence with said bank N. 36°0′ W. 12.00 chs. and N. 45°0′ W. 19.96 chs. to the place of beginning, containing twenty four acres and one-half (24½).

The whole forming an area of one hundred and sixty four acres and fifty five hundredths (164 55/100) and having such shape and form as is fully delineated on the plat above, the variation of my compass being 16° East.

The whole being swamp and overflowed land to the full intent and meaning of an act of the legislature of this state intitled an act to provide for the disposal of the swamp and overflowed land belonging to this state, passed April 28th, 1855, and surveyed in accordance with the provisions of said act and the directions of the Surveyor General of the State of California.

In faith whereof I have hereto set my hand, Benicia this 10th day of October A. D. 1856.

David P. Wade,
County Surveyor, Solano County.
By Em A. d'Hemecourt,
Deputy.

State of California,
County of Solano—ss.

I, F. A. Steiger, County Surveyor of the County of Solano, State of California, do hereby certify the annexed and foregoing to be a full, true and correct copy of Survey Number Thirty-four (34) of Swamp and Overflowed Lands, as the same appears on file and of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand this 21 day of July A. D. 1905.

F. A. Steiger,
County Surveyor.
Solano County, California.
By E. N. Eager, deputy.

State of California,
County of Solano—ss.

I, G. G. HALLIDAY, County Clerk of the County of Solano, State of California, and ex-offi-

cio Clerk of the Superior Court of said County, do hereby certify, that F. A. Steiger by E. N Eager, deputy, whose name is subscribed to the foregoing certificate, was, at the time of signing the same, and now is, the duly elected, qualified and acting County Surveyor of the County of Solano, State of California, and in custody of the records of said office, and full faith and credit are due to all his official acts as such. And I do further certify, that I am well acquainted with the handwriting of the said E. N. Eager and verily believe that the signature to the said certificate is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Superior Court, this 21st day of July A. D. 1905.

[Seal] G. G. Halliday,
County Clerk and ex-officio Clerk of the Superior Court.
By A. S. Halliday,
Dep. Co. Clerk.

Mr. PECKHAM: Also the patent from the State of California to Darlington, dated March 18, 1857, by F. Neeley Johnson, Governor, which is received in evidence as "Plaintiff's Exhibit "I-1".)

Mr. PECKHAM: We offer a certified copy of the deed from David N. Darlington to Rutherford Moody, dated June 6, 1859, purporting to remise, release, convey and confirm to Moody all of the interest of the grantor in two-sevenths undivided part of tract of land containing 164.55 acres, being on

Mare Island and described in the patent as described in the deed.

(The document was received in evidence as "Plaintiff's Exhibit "I-2".)

Mr. PECKHAM: We next offer from the record in the Sawyer vs. [178] Osterhaus case, original of the deed from David N. Darlington to Isaiah Hanscom, dated June 6, 1859, purporting to convey all of the right, title and interest of the grantor of one-seventh undivided part of the tract of land containing 164.55 acres, being on Mare Island, as described in the deed.

(Deed received in evidence as "Plaintiff's Exhibit "I-3.")

The following exhibits were next introduced by plaintiff and are described as follows:

"Exhibit I-4", deed from Darlington to Secor, dated June 6, 1855, purporting to convey grantor's right, title and interest in three-sevenths of the said 164.55 acres.

"Exhibit I-5", deed dated September 2, 1861, between Zeno Secor and Peter R. Kissam, of an undivided one-seventh part of the said 164.55 acres.

"Exhibit I-6", deed between Peter R. Kissam and Mary Ann Secor, quitclaiming to grantee undivided one-seventh part of said 164.55 acres.

Mr. PECKHAM: We offer a copy of the mandamus proceedings in the Court of Appeals for the District of Columbia, No. 4561, Hubert Work, as Secretary of the Interior, Appellant, vs. The

(Testimony of Frank E. Barker.)

United States of America, Ex rel. James E. O'Donnell, Appellee, which was received in evidence as "Plaintiff's Exhibit J".

Mr. PECKHAM: We offer a certified copy of the patent to the State of California of the land described in the Darlington Survey, (Document received in evidence as "Plaintiff's Exhibit K".)

WITNESS continuing: I have studied the patent of the United States Government to the State of California, covering and embracing the premises described in California State Segregation Swamp and Overflowed Land Survey No. 34.

I have also studied the Survey made by Em. Ad. Hemecourt, Deputy of David P. Wade, of October 10, 1856, and I believe that the patent accords with that survey. I cannot locate the land de- [179] scribed in that patent and survey on any approved and accepted sectionized survey of the United States Land Office covering Mare Island. No approved and accepted sectionized survey of that particular tract by the United States Land Office exists. No such legal subdivisions as are found in that patent exist on any official, approved and accepted sectionized survey of Township 3 North, Range 4 West, Mount Diablo Base and Meridian. I do not have in my office any record of the approval by the United States Surveyor General for California of Swamp and Overflowed Segregation Survey No. 34. I do not find in my office any Township Plat constructed or approved, showing thereupon Swamp and Overflow Survey 34. I do not find any record

(Testimony of Frank E. Barker.)

of the forwarding of such constructed, approved Township Plats to the General Land Office.

Referring to "Plaintiff's Exhibits A and B", being the Dyer and Joy Surveys, these two are the only approved and accepted sectionized surveys of Township 3 North, Range 4 West, Mount Diablo Base and Meridian.

Referring to "Plaintiff's Exhibit A", which is dated March 4, 1863, the line surrounding Mare Island, as shown on that map, is not a surveyed line and I do not find any indication of courses or distances on that line, or places of commencement that would enable a surveyor to pick them up and run them out at a later date. There is nothing on that line in the nature of engineering data which would enable a surveyor to pick it up and run it.

I have made a search for the correspondence and the chart accompanying it for the reservation of Mare Island in 1853 and have not been able to find it. I presume it was burned in the fire of 1906. I have also made a search for the original records of the Freeman Survey and the correspondence relating thereto and contemporaneous therewith, but have been unable to find it. I presume it also was burned in the fire of 1906.

I have been with the United States Survey Office under the [180] United States Surveyor General from 1906 to the present time and I have been Chief of that office since March, 1926. I believe I am familiar with the rules, procedure and practices of that office with respect to surveys.

(Testimony of Frank E. Barker.)

Q: I will show you a copy of a notice that was printed by Surveyor General Rollins in the "Alta California", reciting the completion of and return of the Freeman Survey, and I will ask you if, according to the rules, practices and usages of your office, Rollins would have published that notice if he had not approved the survey therein mentioned.

Mr. KELBY: Object to the question on the ground that it is placing a construction upon regulations that are not produced here and as to which the regulations themselves are the best evidence; as to whether or not a particular officer of the United States would or would not do something is beyond the ken of the witness.

The COURT: Objection overruled and exception. You may answer.

A: I do not believe, from my experience, that this notice would have been published in the paper unless the Surveyor General had been satisfied with the survey as made by Freeman.

Mr. KELBY: I move that the answer of the witness be stricken out for the reason that it is incompetent.

The COURT: It may go out.

Mr. PECKHAM: Exception.

The COURT: Denied and exception.

Mr. PECKHAM: May the records show that the testimony just given by the witness related to Government's Exhibit Y. I will show you on Government's Exhibit Z a copy of the letter from General

Ames to Williamson, Commissioner of the Land Office, transmitting the tracing and on account of Freeman, and I will ask you if that voucher would have been O. K.'d and transmitted and the tracing transmitted if the Surveyor General Ames did not approve the Freeman Survey.

Mr. KELBY: I object to that, on the ground that it is clear- [181] ly incompetent, calling for the conclusion of the witness.

The COURT: Sustained.

Mr. PECKHAM: To which we except, if your Honor please, with all respect.

Q: From your knowledge of the rules, regulations and practices of the Land Office can you state whether or not the Surveyor General would have authorized the payment of a Deputy Surveyor making a survey if he did not approve the survey.

Mr. KELBY: The same objection.

The COURT: Overruled and exception.

A: If the Surveyor General were not satisfied with the survey, in my opinion he would not have transmitted the account for payment of the survey.

Mr. KELBY: I move that the answer of the witness be stricken out on the ground that it is clearly incompetent.

The COURT: Denied and exception.

Mr. PECKHAM: Q. I show you from Government's Exhibit Z the certificate of Surveyor General Ames dated January 18, 1858, reciting publication of the notice of the completion and return of the Freeman survey between the dates, I believe, of October 11 and November 10; will you examine

that and state whether or not from your knowledge of the practice, usages and regulations of the Interior Department, Land Office, Surveyor General Ames would have made that certificate if he had disapproved the Freeman survey?

Mr. KELBY: Objected to as incompetent, calling for the conclusion of this witness.

The COURT: It surely does call for the witness' conclusion.

Mr. PECKHAM: I know it does.

The COURT: I do not see how that testimony aids the Court.

Mr. PECKHAM: Because the original records have been burned in the fire and we are trying to get at the probabilities of the case.

The COURT: Might not the Court conclude that? [182]

Mr. PECKHAM: I think the Court could.

The COURT: How then would the Court be aided by the testimony of this witness?

Mr. PECKHAM: This witness, after all of these years in the Land Office, has knowledge of the practices, usages and regulations of the office.

The COURT: Overruled and exception.

A: I do not believe that Surveyor General Ames would have made this certificate if he had not been satisfied with the survey as made by Freeman.

Mr. KELBY: It is moved that the answer of the witness be stricken as incompetent.

The COURT: Denied and exception.

Mr. PECKHAM: Q: Mr. Barker, from your knowledge of the practices, usages and customs of

the Land Office, would Surveyor General Ames have made that certificate without note of a protest if a protest had in fact been filed by that date?

Mr. KELBY: The same objection.

The COURT: Overruled and exception.

A: Well, I am not so sure about that. He might have received a protest and certify that this had been advertised.

Mr. PECKHAM: Q: If he had received such a protest what would he have done?

Mr. KELBY: I object to that as calling for the conclusion of the witness; incompetent.

The COURT: Overruled and exception.

A: He would have forwarded the protest to the Commissioner of the General Land Office with the return of the survey for the information of the Commissioner.

Mr. PECKHAM: Q: That would have been his duty? I believe so.

Q: It would also have been his duty, would it not, to have given his opinion upon the protest? [183]

Mr. KELBY: Objected to for the same reasons already stated.

The COURT: Overruled and exception.

A: Probably if he were satisfied with the return of the survey, the return would have spoken for itself as to the protest, that is, his answer.

Mr. KELBY: I move that the answer be stricken out as incompetent.

The COURT: Denied and exception. [184]

TESTIMONY OF ALFRED MODESTO SOBIERALSKI,

A Witness for Plaintiff.

I am commissioned by the President, Hydrographic and Geodetic Engineer, Coast and Geodetic Survey. I am a member of the Committee on Topographic and Hydrographic Survey of the American Society of Civil Engineers. I am a Civil Engineer, Surveyor and Map-Maker. I am also a member of the Committee on Airplane Surveys and a member of the American Technical Standards Committee of Surveys and Maps and am also Assistant Chief of the Division of Charts in the Coast and Geodetic Survey. As such Assistant Chief of the Division of Charts, I have direct custody of all of the surveys made by the Coast and Geodetic Surveys since earliest times. All surveys and published charts being made at present pass through my hands for verification. My verification and review consist of thirty-five hydrographic engineers who take original field records received in the office and verify all details which we are able to verify from any notes or reports which are submitted with the records. The earliest topographical survey made by the Coast Survey are dated 1835 and I have all the surveys made by our Bureau under my custody. All questions regarding interpretation of any of the earlier surveys are referred to me. Ever since I graduated from College, in 1908, I have done work in the field in the matter of coast and geodetic surveys. I have made a great many surveys in various parts of the

(Testimony of Alfred Modesto Sobieralski.)

United States and its possessions. My position is generally examining and interpreting surveys.

The document now shown to me I recognize as a copy of a map in the Library of Congress in Washington. It is a survey by Ayala in 1775 and is a chart of San Francisco Bay. The reference on the map to the Spanish name Bahia Redonda is well known to be the earlier name of the San Pablo Bay, the area of which I will outline with red pencil. Carquinez Straits is easily identified on this map by its resemblance to the present map of that area. The area which [185] corresponds to Mare Island is indicated on the map as a long, flat area of unbroken continuity from a point which corresponds to Mare Island Straits to a large stream some distance to the westward.

Referring to the San Pablo shore line, there is no indication of a water course breaking the continuity of this shore line. There is no indication of a water course connecting Mare Island Straits with San Pablo Bay.

Q. Do you find anything on that map that indicates the map-maker's description of Mare Island.

A. The letter "V", applied to this area, refers to a note which says: "Isla Plana", which has been translated as "an island of the plains, or flat land".

(The map of 1775 is received in evidence as "Plaintiff's Exhibit L-1".)

WITNESS continuing: The document now shown me is a map of San Francisco Bay, a copy of which

(Testimony of Alfred Modesto Sobieralski.)

is in the Library of Congress at Washington. The date assigned to the map by the Library of Congress was 1803 and is certified by the Library of Congress. The area corresponding to San Pablo Bay, on which is easily read the Spanish name "Bahia Redonda", shows an entrance of an outlet corresponding to Carquinez Straits, and to the westward of that entrance another body of water heading toward the north, which should be identified as Mare Island Strait, or Napa River. There is a long, narrow body of land connected to the northward by a very narrow strip of land and this by the differentiation of the symbols on the map is represented as a low, flat area extending from Mare Island Straits along the whole northern shore of San Pablo Bay, which represents the land area that is now known as Mare Island and is represented as an area of land of unbroken continuity from Mare Island Straits westward to the large stream or body of water surrounding it. There is no indication of a water-way in connection with Mare Island Straits or San Pablo Bay. [186]

(The document was received in evidence as "Plaintiff's Exhibit L-2".)

WITNESS continuing: The document now shown to me is a copy of the Spanish map in the Library of Congress and certified to be a true copy. The map covers San Francisco Bay and at the northerly entrance it shows an area corresponding

(Testimony of Alfred Modesto Sobieralski.)

with San Pablo Bay, at the northeast corner of which is a passage corresponding to Carquinez Straits, leading into a large body of water corresponding to Suisun Bay. To the westward of the entrance of Carqinez Straits is a body of water extending northwesterly which would correspond to Mare Island Straits and Napa River. I find on the map an area of unbroken land extending from this point which I have described as the entrance to Mare Island Straits, which corresponds to the Mare Island area. There is no water-way depicted on the map connecting Mare Island Straits with San Pablo Bay.

(The document was received in evidence as "Plaintiff's Exhibit L-3".)

WITNESS continuing: The document now shown me is a copy of an original Spanish map in the Library of Congress and is dated 1781. It is a plan of a port of San Francisco and covers the whole area of San Francisco Bay and extends up into the waters of the Sacramento River. San Pablo Bay is indicated by the area marked "H" on the map. I find on the map at the northeast shore of the bay a large area of land extending from a point separated from the entrance to Carqinez Straits by a body of water and extending northwestward towards another large stream. There is an unbroken shore line between the two points. There is no water-way of any kind indicated between what cor-

(Testimony of Alfred Modesto Sobieralski.)

responds to Mare Island Straits and San Pablo Bay.

(The document was received in evidence as "Plaintiff's Exhibit L-4".)

WITNESS continuing: The original of the document now shown me is a very elaborately engraved map in the Library of Congress, the title of which says: "Plan of the Port of San Francisco", published in Mexico in 1825. San Pablo Bay can be recognized by the resemblance to the present map of San Pablo Bay.

Referring to the northeast shore of San Pablo Bay, there is a body of water corresponding to Mare Island Straits and Napa River, the shore line extending from Napa River to a large stream or river to the westward. There is a contiguous shore line from the entrance to Mare Island Straits to this large river to the westward. There is no representation of any stream crossing from the vicinity of Mare Island Straits to San Pablo Bay.

(The document was offered in evidence as "Plaintiff's Exhibit L-5".)

WITNESS continuing: The document now shown to me is a copy of a map in the archives of Coast and Geodetic Survey, printed in England, I believe, in 1798. There is on the map a representation of an area which corresponds to the present map of San Pablo Bay. At the northeast shore of San Pablo Bay, as represented on this map, is a body of water just westward of Carquinez Straits which

(Testimony of Alfred Modesto Sobieralski.)

would correspond to Mare Island Straits. There is no island indicated on this map which corresponds to Mare Island. There is an unbroken shore line from the entrance to Mare Island Straits to a large stream to the westward which is a continuous shore line all along the northeast shore of San Pablo Bay. There is no evidence on the map of a stream or water-way connecting San Pablo Bay with Mare Island Straits or Napa River. "G. G. & J. Robinson, Pater-noster Row, London," were map printers in England.

Mr. BURKE: I might save time, if your Honor please. I am willing to stipulate that the Government *that the Government* can produce a hundred additional maps of similar character. This is making a tremendous record. I am willing to stipulate that they have a hundred of such maps, Spanish maps, English maps, and French maps, [188] and they are all of identical character, showing an unbroken shore line from Carquinez Straits to Sonoma Creek. That is all he can prove ultimately by these exhibits, even if they are competent. It is only building up a record that is very lengthy.

Mr. PECKHAM: If your Honor please, our purpose in doing this is to show the permanent character of that unbroken shore line, and that it was never crossed by a stream since recorded history began and maps began to be made of it, that Mare Island is all one block of land.

(Testimony of Alfred Modesto Sobieralski.)

(The document was received in evidence as "Plaintiff's Exhibit L-6-A".)

WITNESS continuing: The document now shown me is a copy of a map in the archives in the Coast and Geodetic Survey, published by A. Dalrymple, who was a British hydrographer and map publisher. His maps were used by the British Navy. The map indicates San Pablo Bay somewhat similar to the present map of San Pablo Bay and shows Carquinez Straits and a body of water corresponding to Mare Island Straits. The northeast shore of the San Pablo Bay, extending from Mare Island Straits to a large river to the westward is shown as an unbroken shore line and the body of land so represented is shown to be continuous. There is no stream connecting San Pablo Bay with Mare Island Straits.

(The document was offered in evidence as "Plaintiff's Exhibit L-6-A".)

The exhibit now shown me is an Admiralty Chart of San Francisco Harbor, printed at the Hydrographic Office of the British Admiralty, surveyed by Captain F. W. Beechey, 1827-8, who was Captain in the Royal Navy. The document depicts San Pablo Bay; and Mare Island Straits is shown in much the same position as is shown on the present chart. Along the northeast shore of San Pablo Bay and the Mare Island area is an unbroken stretch of shore line from Mare Island Straits, extending westward to a small stream some distance [189] to the westward. The map only goes a

(Testimony of Alfred Modesto Sobieralski.)

short distance up Mare Island Straits, but in the area shown, there is no break in the shore line. There are several small streams shown draining into Mare Lsland Straits, but there is no stream connecting Mare Island Straits with San Pablo Bay.

(The document was received in evidence as "Plaintiff's Exhibit L-7".)

WITNESS continuing: The document now shown me is an engraving from a copper plate in the archives of the Coast and Geodetic Survey. The title of the map is "Map of Sacramento River and Bay of San Pablo with Harbor of San Francisco by the U. S. Exploring Expedition, 1841", of which Wilkes was in command. Mare Island Straits is shown at the northeast shore of San Pablo Bay and there are soundings on the map, indicating that they had actually been in that area and taken these soundings.

Referring to the northeast shore of San Pablo Bay, the shore line of this section of Mare Island is indicated in a solid line and is unbroken from Mare Island Straits to a stream which can be plainly recognized as Sonoma Creek. There is no evidence of any waterway connecting San Pablo Bay with Mare Island Straits. There is no island indicated on the map. It is indicated as an unbroken shore line from along the shore of San Pablo Bay from Mare Island Straits to Sonoma Creek; the northern limits of such area are not shown. The difference between the present map and Beechey's survey (L-7) is that in this map they have extended the

(Testimony of Alfred Modesto Sobieralski.)

representation of Napa River or Mare Island Straits further north than Beechey's survey shows it and have also soundings in Sonoma Creek that Beechey had indicated in a sketchy area.

(The document was received in evidence as "Plaintiff's Exhibit L-8".)

WITNESS continuing: The document shown me is a copy of a map that is in the Library of Congress from the surveys of John Charles [190] Fremont, and the map is a section of a larger map covering the Coast of California. San Pablo Bay is represented on this map and Mare Island Straits is indicated as a body of water extending up from San Pablo Bay northwardly. The area corresponding to Mare Island can be recognized and extends from Mare Island Straits westward along the north shore of San Pablo Bay. There is no evidence of a waterway connecting Mare Island Straits with San Pablo Bay. There is no break in the continuity of the shore line or a body of water that corresponds to the Mare Island Straits over to the large stream in the northwest part of San Pablo Bay.

(The document was received in evidence as "Plaintiff's Exhibit L-8-A".)

WITNESS continuing: The document now shown me is a copy of a map in the Library of Congress, entitled: "A correct map from actual surveys and examinations embracing a portion of California between Monterey and the Prairie Buttes, Marysville Buttes," drawn by Stuart, who was a hydrographer with the U. S. Exploring Expedition and later col-

(Testimony of Alfred Modesto Sobieralski.)

laborated with Ringgold in maps of San Francisco Bay. The Bay of San Pablo is shown on the chart, and Mare Island Straits is shown connected with Napa River, extending to the northward. From the entrance to the Mare Island Straits the land extends northwestward to a stream which is undoubtedly Sonoma Creek. The shore line of San Pablo Bay between the entrance to Mare Island Straits and the entrance to the creek to the west is shown on the map as an unbroken shore line between those two points. There is no indication of a water-way connecting San Pablo Bay with Mare Island Straits.

(The document was received in evidence as "Plaintiff's Exhibit L-8-B".)

WITNESS continuing: The document now shown me is a copy of the map in the archives in the Coast and Geodetic Survey, entitled: "Sketch of General Riley's Route through the Mining Districts, dated 1849, copied from the original sketch by Lt. Derby in the Office [191] of the Tenth Military Department, by J. McH. Hollingsworth, Assistant." Riley was Military Governor of California. The map shows an island extending from the entrance to Carquinez Straits separated from the land to the northward by a body of water extending over to Sonoma Creek. It is indicated as a continuous body of land from the two points I have mentioned. There is no stream of water crossing this body of land from what corresponds to the entrance of Mare Island Straits to Sonoma Creek.

(Testimony of Alfred Modesto Sobieralski.)

(The document was received in evidence as "Plaintiff's Exhibit L-9".)

WITNESS continuing: The document now shown me is a copy of a map in the archives of the Coast and Geodetic Survey, entitled: "New Map of the Gold Rush in California, by Charles Drayton Gibbes, from his own and other recent surveys and explorations, dated 1851." Mare Island Straits and Napa River are indicated on this map by name and there is no evidence of a stream of water connecting Napa River with San Pablo Bay. The land is of unbroken continuity from the entrance to Mare Island Straits along the north shore of San Pablo Bay to Sonoma Creek.

(The document was received in evidence as "Plaintiff's Exhibit L-10.")

WITNESS continuing: The document now shown me is a copy of a map in the archives of the Coast and Geodetic Survey, entitled: "Chart of the Bay of San Pablo, Straits of Carquinez, and part of the Bay of San Francisco, California, by Cadwalader Ringgold," who was a Naval Officer who made surveys and published maps of San Francisco in 1850. He was later sent on important survey expeditions by the Hydrographic Office of the Navy. There is a large island extending from a point opposite Vallejo for a considerable distance up Napa River and a narrow body of water connecting Napa River, but none shown connecting Napa River with San Pablo Bay, except the one heretofore mentioned. The San Pablo Bay shore line of this body of [192]

(Testimony of Alfred Modesto Sobieralski.)

land between the entrance to Sonoma Creek and Mare Island Straits is unbroken.

(The document was received in evidence as "Plaintiff's Exhibit L-11".)

WITNESS continuing: The document now shown me is a copy of a map published by Cadwalader Ringgold, the original being in the archives of the Coast and Geodetic Survey. The map represents Suisun and Vallejo Bays with the confluence of the Rivers Sacramento and San Joaquin.

Mr. PECKHAM: If your Honor please, this, we believe, was one of the charts that went in with the Sloat Board Report. To make the report of the Sloat Board complete, it may be necessary to refer to it.

Mr. BURKE: I do not concede, however, that that is the chart referred to in the Sloat Board.

(The document was received in evidence as "Plaintiff's Exhibit L-12".)

WITNESS continuing: The document now shown me is a copy of a map in the archives of the Coast and Geodetic Survey, showing entrance to the Bay of San Francisco, Bays of San Francisco and San Pablo, Straits of Carquinez and Suisun Bay, and the Sacramento and San Joaquin Rivers, by Cadwalader Ringgold, dated 1850, who was then a Commander in the United States Navy. There is an island indicated extending from the entrance of Napa Creek to Sonoma River. The shore line from Sonoma Creek eastward to Mare Island Straits is

(Testimony of Alfred Modesto Sobieralski.)

shown unbroken. There is no indication of a water course in that area. I find no indication of the northeast shore of San Pablo Bay being intersected by a water-way connecting Mare Island with San Pablo Bay except one that connects Napa River with Sonoma River well to the northward of the Town of Vallejo. In a map of this kind, covering such a large area, it would be an enormous undertaking to survey all the area covered and it is customary to consult the best authorities available and make some surveys if the means [193] are available. At the time, 1850, it was in the time of the gold rush and there were no charts of this area available and the business men of San Francisco whose names appear on the map had confidence in Ringgold as a map publisher and requested him to prepare and order this map, which was the best chart available at that time.

(The document was received in evidence as "Plaintiff's Exhibit L-13.")

WITNESS continuing: The document now shown me is a copy of a map which was published in the Coast and Geodetic Survey Report for 1850 and is entitled: "Sketch 'J', showing the progress of the Bay of San Francisco, California," dated 1850, made by Coast and Geodetic Survey. The area along San Pablo Bay from Mare Island Straits westward to Sonoma Creek is shown unbroken by any stream or water-way and has a continuous land area. There is also shown to me a similar sketch, "J-2", published with the report of the Superin-

(Testimony of Alfred Modesto Sobieralski.)

tendent of the Coast and Geodetic Survey for 1852, which shows the shore line of San Pablo Bay between Mare Island Straits and Sonoma Creek is continuous and shows no water-way breaking the continuity of this shore line.

(The document was received in evidence as "Plaintiff's Exhibit L-13-A".)

WITNESS continuing: There are several triangulation stations along that shore which indicate that those have been visited and occupied by the surveyors.

(The document was received in evidence as "Plaintiff's Exhibit L-13-B".)

WITNESS continuing: The document now shown me is a copy on the same scale as the original survey by the Coast and Geodetic Survey, of Mare Island Straits, dated 1849, designated in our records as Register No. 236. The heavy dark line running from southeast to northwest across the map indicates the shore line which, in our work, had always been considered the mean high water line. The first brok- [194] en, dotted line to the east of that out toward the middle of Mare Island Straits indicates the plane of reference to the work which, in this case, is the mean low water and is a submarine contour showing that plane and indicates that the area inside of that line between that line and the high water line was exposed at low water. The numbers inside of the low water line are the reduced soundings which are actual soundings minus the correction for the time of the tide at the time and when preceded by a minus sign they indicate

(Testimony of Alfred Modesto Sobieralski.)

elevations which the bottom will bear when tide stands at low water. With respect to the stopping of these numbers or line of soundings at the heavy dark line, representing the Mare Island shore, the boats, in taking the soundings, if they had not encountered some barrier, would have continued the soundings on down beyond and if that line were covered at high water, the soundings would have been carried across that line. The fact that the continuity of the low water mark, as shown on the map, is so regular would indicate it is not very probable that there was any water-way across there.

(The document was received in evidence as "Plaintiff's Exhibit L-14".)

WITNESS continuing: Referring to "Plaintiff's Exhibit L-14", the line on the neck of the Isthmus opposite the northernmost horizontal line of the figures "Mare Island Signal" mean that there was a station there of some kind which surveyors used in determining their position in taking soundings. The structure is usually some sixteen or twenty feet high and a fairly substantial structure, and if any dry land were available, it is constructed there rather than in shoal water. The point on the map which is represented by the letter "X" represents where the Machine Shop is. The signal called "Mare Island", using the scale that is shown on the map, is 1300 meters or approximately three-quarters of a mile north of the Machine Shop, indicated by the letter "X". The phrase shown on the map, "Triangulation by J. S. Williams, Assistant U. S. C. S.

(Testimony of Alfred Modesto Sobieralski.)

and [195] S. F. Blunt, Lieutenant U. S. N.", indicates that the survey was determined in a survey that had been made before control by triangulation, which means accurate measurement of the distance between points which were used to control triangulation. S. F. Blunt was a Naval Officer who was assigned to work in the Coast Survey, and also collaborated with Ringgold in preparing maps of San Francisco Bay, and also had some connection with the Commission for selection of fortifications and naval site, which is the Smith Board.

(The letter from Col. Smith, of the Smith Board, was received in evidence as "Plaintiff's Exhibit L-15.")

WITNESS continuing: The document now shown me is a topographical survey made by A. D. Bache, by R. D. Cutts. Cutts was an officer of the Coast and Geodetic Survey, the date of which is 1851. The cross-hatching on the Isthmus at the north end of Mare Island indicates wet land of Mare Island. The heavy black line on the west side of that cross-hatching represents the shore line which, in the work of the Coast and Geodetic Survey, has always been considered the nearest approximation which can be made to the mean high water line. However, the black line at the east side of the Isthmus represents a shore line, the nearest approximation to the mean high water line. The dotted, broken line to the west of the Isthmus represents the mean low water line or the limit to

(Testimony of Alfred Modesto Sobieralski.)

which the land was exposed at low water. The broken or dotted line to the east of the Isthmus indicates the low water line along the Mare Island Straits side of the Island and the significance of the break in the heavy dotted line represents the high water line on the east and west sides of the Isthmus, indicates the limits of the survey, that the survey did not extend beyond that point.

Referring to the regularity of the low water line on the San Pablo side of Mare Island and also the low water line on the Mare Island Straits side of the Isthmus, if a surveyor saw this area [196] bare at low water and if there had been a water course, he would have shown it on his map. In addition to that, the regularity of the lines indicates the improbability of any stream. If there was a stream or water course connecting San Pablo Bay with Mare Island Straits, at that point, it would have produced an indentation of the low water line on each side and what I have said about the dark line on the Isthmus is also true of the dark line dividing the cross-hatched portion from the White portion of the Mare Island Straits further down on the map. Within the limits of this survey, it shows that the land area to the northward is continuous. This map carries north of the present Machine Shop at Mare Island approximately 1800 feet. The Isthmus, according to the high water line that is indicated, is 150 meters wide, which would be close to 500 feet, which is the width of the peninsula at its narrowest point, according to the map. The dis-

(Testimony of Alfred Modesto Sobieralski.)

tance on this map between the low water line on the Mare Island Straits side and the San Pablo side is 910 meters, which is about 2957 feet. According to this map, this is the width of the Peninsula at its narrowest point at low tide.

The representation in white, on the tule area at the northeast of Mare Island, as depicted on the map, indicates a small pond and I do not see how there could be any pond if the area was not above high water.

(The document was received in evidence as "Plaintiff's Exhibit L-16".)

WITNESS continuing: The document now shown me is a chart of the Mare Island Straits, published by the Coast and Geodetic Survey. The difference between a chart and a survey is that a chart is a compilation from a survey and in compiling our charts during those years, we used nothing but our own surveys. This is the first chart of this area published and, as is said in the title, is from the survey by McArthur and Cutts, which were present.

Mr. BURKE: In other words, the previous plats and charts are unsurveyed.

A: Not by the Coast and Geodetic Survey.

Q: They were not surveyed by the Coast and Geodetic Survey? [197]

A: This is the first chart published of this area.

Mr. BURKE: That is my understanding, that is the first survey that was made.

(Testimony of Alfred Modesto Sobieralski.)

Mr. PECKHAM: Just a moment.

Q: Was this the first survey that was made of that area?

A: .This is not a survey, this is a chart, and in the title are references to the surveys from which it was compiled, and those surveys have been presented to me for comment.

Q: Was this Cutts map a survey?

A: That is an actual survey.

Q: Government's Exhibit L-16 was an actual survey?

A: Yes.

Q: And this is a map or chart made from the survey?

A: You can see the scale of this is much smaller than a usual survey.

(The document was received in evidence as "Plaintiff's Exhibit L-17".)

WITNESS continuing: The document now shown me is a full scale copy of the original survey made by Rodgers, of the Coast and Geodetic Survey in 1850. Rodgers was an officer of the Coast and Geodetic Survey, who made a complete survey of San Francisco Bay. Before making this survey he had surveyed all of the southerly part of San Francisco Bay, including all of the marsh land bordering the shore. I have handled a great deal of his work and compared it with more recent surveys and have found his work unusually accurate, dependable and complete. The dark line dividing

(Testimony of Alfred Modesto Sobieralski.)

the cross-hatching from the white, between Mare Island Navy Yard and the northernmost limits of the map on the San Pablo side represents the shore line which, as I said before, the Coast Survey has always tried to approximate the mean high water line. The similar dark line at the east side of the cross-hatched portion is also the shore line on the Napa Creek side. The broken or dotted line to the west of the [198] San Pablo shore line represents the mean low water line. The dotted line on the east side of Mare Island on the Napa Strait side represents the low water line on the Napa Creek side. The part of the shore line from San Pablo Bay to Napa Strait, as indicated on this map, is unbroken by any stream. There is no stream crossing the Isthmus, connecting Napa Straits with San Pablo Bay. The broken wavy line at the south end of the cross-hatched section represents the dividing line between the marsh land and highland to the southward of it. The map indicates that the land adjoining the high land is continuous within the limits of this map along the shore of San Pablo Bay.

Mr. BURKE: Might I ask a question? What do you mean by high land?

A. I happen to have seen—

Q. (Interrupting) In speaking of that map, what do you mean by high land?

A. It is a relative term. In this case I am referring to the area which is covered by contours.

Q. I am asking you what is the meaning of high land? Do you mean the high water mark, or do you mean the line of the uplands?

(Testimony of Alfred Modesto Sobieralski.)

A. That line that I have just spoken about now. What I consider high land there is land that is considerably above high water, a considerable elevation above high water.

Q. Isn't this line that I indicate here—may I put a mark on it, an "X"?—isn't that line over there, around there, down to San Pablo Bay, the line of uplands of this body of land which is marked "Mare Island"?

A. You will have to explain what you mean by upland.

Q. You are an expert, I ask you if that is the line of uplands.

A. That is a dividing line between marsh land and land of another character.

Q. What is the land of the other character?

A. It is not indicated. [199]

Q. In other words, you say it is not the line of the uplands between Mare Island and this line, here?

A. Until you specify what you mean by "upland", it is not a term which was used—

Q. (Interrupting) Well, then, high land, what is high land as distinguished from low land at the sea level?

A. I would say land that is above the most extreme tide would be called high land. That is my application of the term.

Q. Your definition of upland is land—

A. Not upland.

(Testimony of Alfred Modesto Sobieralski.)

Q. That high land is not land that is just above the ordinary high water mark?

A. Yes.

Q. Suppose it was two inches above ordinary high water mark?

Mr. PECKHAM: I submit the witness ought to have a chance to explain.

Mr. BURKE: Suppose this land was six inches, or, put it this way, this land was .67 of a foot above the high water mark, would that be high land?

A. It would be land above mean high water.

Q. Would it be upland?

Mr. PECKHAM: The witness has said he does not know what you are talking about when you say "upland".

Mr. BURKE: Your own report calls it upland.

The COURT: Do you want to add anything to your answer?

A. No, I think I have answered the question.

(The document was received in evidence as "Plaintiff's Exhibit L-18".)

WITNESS continuing: Referring to Exhibit "L-18", the shore line from Boat Cut-Off to the place where the Navy Yard is now located is broken by a few small sloughs draining the land toward Napa Creek, but no water-way traversing the land from Napa Creek to San Pablo Bay. There are no streams draining toward San Pablo Bay. All of the streams drain toward Napa Creek. This indicates that the land bordering San Pablo Bay must have

(Testimony of Alfred Modesto Sobieralski.)

been high enough to cause a drainage in one direction. [200]

Referring to the line marked "X" by Mr. Burke, and to the line that is marked "Y", immediately to the east of the high land of Mare Island, the two lines represent the same condition, a dividing line between land of two different characters and, as I read the map, the two different characters are on one side of the land indicated as "marsh" and on the other it is land which is called high land in a term of reference distinguishing it from marsh land.

There is no water-way which connects Napa Creek with San Pablo Bay. The San Pablo Bay low water line is unbroken and very regular in shape, indicating that there could be no water-way entering from San Pablo Bay. As far north as Boat Cut-Off, low water line is also very regular, indicating that no stream could enter; and the sharp change in direction in the vicinity of Boat Cut-Off is of a character which would have been shown if there had been some water-way crossing from Napa Creek to San Pablo Bay.

The significance of the ending of the lines of the cross-hatching and the line of the high water line, as well as the line of boundary of Navy Yard Slough at the left-hand corner of the map is that it is the limit of the survey on this sheet. The white spots in the middle of the cross-hatching indicate small ponds. I have seen the original of this map. On the

(Testimony of Alfred Modesto Sobieralski.)

original map there is a coloring and also on "Exhibit L-16". The original of the document which I am testifying about has light blue coloring in a small area which is indicated "white" on the copy about which I am testifying and is invariably used both by the Coast and Geodetic Survey and other organizations to indicate water and corresponds to the water in the Mare Island Straits and San Pablo Bay.

WITNESS continuing: The document now shown to me is a photographic copy of Coast and Geodetic Survey plane table sheets, surveyed by plane table method, dated 1856. By a plane table survey, the man has an instrument on which he takes this original sheet into the field, makes his measurements and directions actual- [201] ly on the ground and draws them to scale on this original sheet; that is the record which he has on file in the office. The man has actually traversed all this area and made frequent measurements at distances and directions. The document which is shown to me is a continuation of "Exhibit L-18". To the westward there is no indication of a break in the shore line from the point where this survey joins "Exhibit L-18" to Sonoma Creek. The tide land on the Bay side of that shore line indicates the low water line and its regularity, continuity indicates the impossibility of any water-way cutting this shore line. The heavy black line bounding the cross-hatched section of the map along the northwest shore of San

(Testimony of Alfred Modesto Sobieralski.)

Pablo Bay is the delineation of the shore line which, in the Coast and Geodetic Survey practice is the nearest approximation which the surveyor can make to mean high water line. The plane table surveys are made exactly the same way now as they were made in 1856. The markings on the present surveys are comparable to ones made in 1858. They are, as far as I can see on this map, the same symbols and character of work used at present.

(The document was received in evidence as "Plaintiff's Exhibit L-19".)

WITNESS continuing: The document now shown to me is a hydrographic survey by the Coast and Geodetic Survey, dated 1856, made by a party under the command of James Alden, who was one of our best hydrographers at the time and his name has been perpetuated in the name of Alden Banks, off the Coast of California, and several other geographical features. A hydrographic survey is a survey of the water area and is for the guidance of mariners and one of the first requirements of a hydrographic survey is the delineation of the shore line is considered the mean high water line. A topographical survey is a survey of the area inside of the high water line.

Q. Is there any difference in the essential requirements of [202] a hydrographic map and a topographical map, as to the showing of the line at mean high water?

A. In the course of the hydrographic survey, the surveyor approaches the shore very frequently,

(Testimony of Alfred Modesto Sobieralski.)

as may be seen by the soundings here and he is able to see the shore line and one of the requirements of his work is that he have a record of the stage of the tide so that every time he goes near shore he knows at what stage of the tide he is approaching the shore. There are several thousand soundings shown on the map. I might further state that in determining his position when approaching the shore line, he uses entirely different methods from what the topographical surveyor used. He takes the angles to points located on the opposite shore which correspond to measure the distance from those marked points on the opposite shore, so that where he has determined his distance from the opposite shore and locates the shore adjacent to his position in this method, any discrepancy in the topographical survey would immediately become apparent to him.

WITNESS continuing: There is no indication of a water-way connecting Mare Island Straits with San Pablo Bay. The dotted or stippled line to eastward on the Mare Island Straits side of the Isthmus of Mare Island is a mean low water line. The fact that the low water line is regular and that the area has been covered by soundings precludes the possibility of a water-way through that area. In this area the soundings are all indicated as zero, that is, at the period of low water, but I have examined actual records of the soundings and found that on this sheet the hydrographer considered that the mariner would not be interested in any soundings

(Testimony of Alfred Modesto Sobieralski.)

inside the low water line. As indicated, they are zero. The actual record of the soundings, which I believe is in the following exhibit, gives the actual depths in there, which show elevations up to three and four feet above the plane of reference. [203]

The COURT: Q. That is all shallow water around there, isn't it?

A. Yes.

Mr. PECKHAM: Q. All tide flats?

A. Inside of the low water line—of course, at low water there is no water line, it is all bare. The line marked "X" on the map is the dividing line of two characters, the marsh on one side and the line which I call higher land, to distinguish it from marsh land on the other side. The mark "Y", opposite a similar line on the east side of Mare Island is also a dividing line between land which is in character marsh land on one side and higher land on the other side.

The document now shown to me is a photostatic copy of a sheet accompanying this survey, which shows actual soundings which I have previously mentioned as being recorded on the sheet as shallow limits and are from the actual record of the survey made at this time. They are the soundings between the low water line and high water line and they indicate that at low water this bottom was bare to the elevation shown by the minus figures. The minus means that its depth is a negative quantity. It is higher than mean low water.

(Testimony of Alfred Modesto Sobieralski.)

Q. At the shore can you tell us about what the depth above mean low water is?

A. The first one is 1.4 feet, and as we progress to the northward 2.8 feet, 2.7 feet, and at the entrance to Boat Cut-Off 4.8 feet.

The COURT: What is the Boat Cut-Off?

A. That is the name of the slough where the machine shop now stands.

Q. Which way?

A. Northwestward.

Mr. PECKHAM: Q. That is the stream that is indicated as Boat Cut-Off on "Plaintiff's Exhibit L-19"?

A. The name appears on Exhibit L-18.

Q. Have you scaled L-18?

A. Yes.

Q. What is the width of the isthmus at high water at its [204] narrowest place, as measured on L-18?

A. The width of the Isthmus between the high water line on the San Pablo Bay side and the high water line on the Mare Island Straits side is 496 feet.

Q. What is the width at low water at the narrowest point of the Isthmus?

A. The distance between the low water line on the San Pablo Bay side and the low water line on the Mare Island Straits side at its narrowest point, which is closest to the position of the present machine shop is 2812 feet.

(Testimony of Alfred Modesto Sobierajski.)

Q. Does this photostat that you have just been referring to indicate the land stations of the hydrographic surveyor in making these surveys?

A. Yes, the stations are indicated both on the original sheet and on this accompanying sheet.

Mr. PECKHAM: I offer this in evidence as Government's Exhibit L-19.

Q. I hand you this document and ask you what this is?

A. This is a photostatic copy of the notes of record accompanying the survey, which is marked L-20.

Mr. PECKHAM: May we offer the chart of Alden as Government's Exhibit L-20, the photostat of the chart of the low water soundings between high and low water as Government's Exhibit L-21, and the notes of the survey of Alden as Government's Exhibit L-22.

(The documents were marked, respectively, "Plaintiff's Exhibits L-20-21 and 22".)

WITNESS continuing: Referring to the field notes of that survey, the station marked 2-A is about 100 feet to the northwestward of the present Machine Shop, and opposite the angles locating its position, he gives the soundings of two feet, tidal reducer of 4.4, which means that was the height of the tide at that time above the plane of reference, and he makes the note: "End of line at tule shore of Mare Island", which means that boats could not proceed any further; that there was a barrier there beyond which he could not proceed. Station No. 8-A is approximately half a mile north- [205] west-

(Testimony of Alfred Modesto Sobieralski.)

ward of the point occupied by the Machine Shop. It is recorded as April 29, 1856, and note opposite the position of the sounding tidal reducer states: "At tule" and indicates that there was not water sufficient to float the boat or obtain any sounding beyond that point. The entry of the surveyor for Station 7-A is: "End of line on beach." The position of 7-A is still further to the northward about five-eighths of a mile north from a point where the machine shop now stands and indicates that it was impossible to proceed any further.

Station 16-E, shown on the map dated May 5, 1856, are angles for determining the position of soundings and tidal reducer of 5.7 feet, meaning that the tide was 5.7 feet above the plane of reference or the plane of mean low water. The note says: "At tule shore of Mare Island" and indicates there was a barrier beyond which it could not proceed.

Q. What can you say as to the comparison of the height of tide as indicated on that date of 5.7 feet above mean lower low water and the plane of mean high water at that point?

A. That is approximately the best determination of height—I mean high water. I believe it is 5.8 feet above the same plane that is used for reference. Station 16-E is at the entrance to Boat Cut-Off on the Mare Island Strait side and approximately one and one-quarter nautical miles northwesterly of the machine shop at Mare Island. A nautical mile is one and one-eighth times a statute mile.

(Testimony of Alfred Modesto Sobieralski.)

Station 3-C is practically the same position as Station 16-E, that is, one and three-eighths statute miles from the high line of Mare Island. From the field notes of the survey, 3-C is May 2, 1856. At this position were recorded soundings, angles for determining the position and the tidal reducer, and the note: "End of line Boat on shore." The position 20-E on the photostat is also at the entrance to the Boat Cut-Off, being the south entrance. On 20-E May 5, 1856, he records the soundings, angles for determining the position and [206] the tidal reducer, and this note: "Ends at tule shore Mare Island." 20-E is approximately one and three-eighths miles northwest of the point occupied by the machine shop. The figures I have given for 20-E. are practically the same as position 3-C and 16-E.

WITNESS continuing: The document now shown to me is a chart of Mare Island Straits, covered by the Coast and Geodetic Survey and compiled from surveys by R. D. Cutts and A. F. Rodgers and James Alden, and is a compilation of the surveys previously introduced by R. D. Cutts, Captain Rodgers and Captain Alden. The solid dark line along the east side of the cross-hatched portion is the shore line corresponding to the mean high water line and the heavy black line on the San Pablo side of the cross-hatched section indicates shore line corresponding to the mean high water line. The black stippled or dotted area to the east of the Isthmus, between the machine shop and the entrance to Boat Cut-Off represents the low water

(Testimony of Alfred Modesto Sobieralski.)

line and corresponds to the area which we have just been discussing, which is the tide flat area which bares at low water.

Referring to a similar stippled or dotted area on the San Pablo Bay side of the Isthmus, this represents the low water line on the San Pablo Bay shore and the area between the high water line on the San Pablo Bay shore; and the low water line indicates that this area is exposed at low water. There is no water-way indicated on this map connecting Mare Island Straits with San Pablo Bay. Within the limits of this map there is unbroken continuity between the high line at the southerly end of Mare Island and the limits of the map. The regularity of the configuration of low water line indicates the improbability of any water-way connecting Mare Island Straits with San Pablo Bay in this area. The chart is printed from a copper plate in the possession of and archives of the Coast and Geodetic Survey.

(The document was received in evidence as "Plaintiff's Exhibit L-13".) [207]

WITNESS continuing: The document now shown to me is a photograph copy of a chart of Petaluma and Napa Creek, furnished by the Coast and Geodetic Survey in 1861. The inset appearing on the map is to be read in connection with the rest of the map and is a continuation of Napa Creek. Within the limits of the map there is no indication of a water-way crossing the Isthmus, connecting Napa Creek with San Pablo Bay. Along

(Testimony of Alfred Modesto Sobieralski.)

the San Pablo shore, between the area occupied by the Navy Yard and the limits of the chart, the shore line is unbroken by any stream or water-way. The stippled or shaded area to the east of the peninsula, between the machine shop point and Boat Cut-Off represents low water line and the area that is colored by the stippling is exposed at low water. The low water line is very regular in configuration and shows no indication of the probability of a water-way extending across the neck of land.

(The document was received in evidence as "Plaintiff's Exhibit L-24".)

WITNESS continuing: The document now shown to me is a print from a copper plate of a Coast Survey Chart of San Pablo Bay, dated 1863. The solid line along the edge of the cross-hatched area indicates the shore line or the mean high water line. The dark line to the west of the cross-hatched section on the San Pablo side of the island or Isthmus indicates the mean high water line, extending from the area now occupied by the Navy Yard to Sonoma Creek. The high water line is unbroken and there is no indication of a water-way connecting Mare Island Straits with San Pablo Bay. There is no indication of a water-way along the east side of the Isthmus of Mare Island. The area represented by a dark stippled portion or dotted portion directly to the east of that high water line along the east side of the Isthmus is the area as exposed at low water. A similar area on the west side of the Isthmus represents shore area which is exposed at

(Testimony of Alfred Modesto Sobieralski.)

low water. The lighter stippled area to the westward of the last-named area represents the area between low water line and [208] the six-foot contour, between the low water line and the one fathom line. The continuity of the tide flat on the east side of Mare Island at the Isthmus and between the machine shop point and Boat Cut-Off indicates the improbability of any water-way. The continuity of the stippled or dotted portion represents the west side of the tide flats on the west side of the Isthmus and indicates no water-way along that area. The area between low water line and the one fathom curve indicates a shoaling from the northward and no deduction can be drawn from the direction of that line, but the deduction can be drawn solely from the continuance and regularity of the low water line and the tide flat area.

(The document was received in evidence as "Plaintiff's Exhibit L-25".)

WITNESS continuing: The document now shown to me is a photostatic reproduction of a hydrographic survey by the Coast and Geodetic Survey, dated 1876. It is a check-up and amplification of the original survey of Alden Hydrographic Survey on a larger scale. There is no indication of a water-way connecting Mare Island Straits and San Pablo Bay. There is no indication of a water-way along the San Pablo shore connecting with Mare Island Straits. The broken, dotted line nearest to the shore line on the east side of the isthmus repre-

(Testimony of Alfred Modesto Sobieralski.)

sents the low water line. The regularity of that low water line indicates the improbability of any water-way connecting Mare Island Straits and San Pablo Bay. The line which has been marked "X" indicates the dividing line between land of two different characters, swamp land and higher land. The line marked "Y" indicates the dividing line between land of two different characters, the same as the other line. The dotted line on the map indicates the low water line to the northwestward. The line indicated by "Y" is the shore line of this area.

(The document was received in evidence as "Plaintiff's Exhibit L-26".) [209]

WITNESS continuing: The document now shown to me is a photographic copy by full scale of an original survey made in October and November, 1883, by the Coast and Geodetic Survey. The line on the east side of Mare Island ends at the entrance of Boat Cut-Off. The heavy dark lines along the east side of the peninsula represent the shore line of the mean high water line. The cross-hatched area to the eastward of that represents vegetation outside of the high water line and indicates that the marsh grasses have grown toward Mare Island Straits. The heavy black line at the west side of the Isthmus indicates the mean high water line. The cross-hatched portion to the west of that indicates vegetation or grass which sometimes grows outside of the mean high water line. The heavy black line on the west side of the Isthmus represents mean high

(Testimony of Alfred Modesto Sobieralski.)

water line. There is no indication of a stream in this area between mean high water line on the west side of the Isthmus from the high line of Mare Island to the end of the map crossing from San Pablo Bay to Mare Island Straits. Between Boat Cut-Off and the Machine Shop, there is no stream that crosses from Mare Island Straits to San Pablo Bay. If there were any water-way, the surveyor would have indicated it. The heavy, black, wavy line between the cross-hatched section, the light cross-hatched section of the Isthmus and the main body of high land indicates the dividing line between land of two different characters, which is indicated by two different symbols. To the north of the line it is indicated as "wet land" and to the south of it as "grass". A similar black line on the east side of the section, indicated as grass opposite the City of Vallejo, indicates the dividing line between the marsh land and the area covered by grass. The marsh land to the northward of the Machine Shop bears the same relation to the grass land as the marsh land indicated to the eastward of the grass land.

(The document was received in evidence as "Plaintiff's Exhibit L-27".) [210]

WITNESS continuing: The document now shown me is a copy of the Coast and Geodetic Survey Map of Mare Island Straits, dated March, 1916. The cross-hatched section on the Isthmus portion of Mare Island indicates marsh land or wet land. The

(Testimony of Alfred Modesto Sobieralski.)

cross-hatched section to the east of the peninsula is also marsh land. A long line straight to an angle and then straight north and south between Boat Cut-Off and a point down toward the high land of Mare Island, as shown on this document and from its configuration I would assume that it was a ditch artificially cut by a dredge. The proximity of the long dredged channel to the dyke, indicated on the map, conveys to my mind that probably the material for constructing that dyke was obtained from the dredged channel. I do not find that condition on any previous map of Mare Island. The white portion of the map along the Isthmus of Mare Island from the high land to the end of the map indicates that the land is higher and dryer than the area as shown as marsh land. The continuity of the land in the peninsula section with the high land of Mare Island indicates there is no stream separating the land to the northward of the Machine Shop from the area occupied by the Navy Yard. There are several streams entering the Mare Island Straits and draining the land, but none which goes all the way across Mare Island Straits to San Pablo Bay, and that is true of the entire distance from Boat Cut-Off to Machine Shop Point.

(The document was received in evidence as "Plaintiff's Exhibit L-28".)

Witness continuing:

Mr. BURKE: Might I ask the witness a question?

(Testimony of Alfred Modesto Sobieralski.)

Q. Throughout your testimony you have used the word "marsh". Do you mean by that salt marsh?

A. We make no distinction between fresh water and salt water marsh. I use the term in the general sense of land which occasionally is wet.

Q. You have answered my question.

Mr. PECKHAM: I submit the witness has a right to explain. Have you anything else you want to add to your answer?

A. No. [211]

WITNESS continuing: The document now shown to me is a copy of a chart of San Pablo Bay, published by the Coast and Geodetic Survey, dated January, 1915, Catalogue No. 5533. The heavy black line on the San Pablo Bay side of Mare Island represents the shore line or what we consider mean high water line. A similar heavy black line on the east side of Mare Island from the entrance to Mare Island Strait to the entrance of Navy Yard Slough indicated on the map represents the shore line or the mean high water line. The stippled area or broken line area to the eastward of Mare Island Strait side of that high water line represents area which is exposed at low water. The stippled or dotted area to the west and southwest of the San Pablo Shore of Mare Island represents the low water line of the area which is exposed at low water. There is no water-way in this area, connecting Napa Creek with San Pablo Bay. The white section of Mare Island delineated on this map indicates that the land is dry. There is no break in the

(Testimony of Alfred Modesto Sobieralski.)

continuity of the land from the area occupied by the Navy Yard to Sonoma Creek. The words: "Mare Island" on the high land of the Island signifies that the name follows local custom. The words: "Island No. 1" at the north end of Mare Island indicates the local name but does not attempt to define the limits to which that name is to be applied.

I have examined the records of our chart instructions and find that in 1903 a note by the man who made the drawing for the chart of that date, in which he stated that amendments were made in this area, principally dykes and roads, from geological survey quadrangles, and in explanation of the use of those charts he says that we had only one survey in this area, the Coast and Geodetic Survey, and the Geological Survey had a recent one made. Among the factors which he applied were roads and dykes and the name of the newly reclaimed area. Island No. 1 and Tubbs Island were the names so applied, from the statement of the record. The statement in the record shows that this was his application of local people's names to [212] newly reclaimed land in the northerly area of Mare Island. The name Island No. 1, appearing in a chart which was prepared in 1903, the document concerning which I am testifying, is a reprint of the chart of 1903. The name "Island No. 1" was a name which was applied and put on the chart merely for identification.

(The document was received in evidence as "Plaintiff's Exhibit L-29".)

(Testimony of Alfred Modesto Sobieralski.)

WITNESS continuing: The document now shown to me is a copy of the same chart, No. 5533, published by the Coast and Geodetic Survey and corrected to June 30, 1931. The names "Island No. 1 and Island No. 2" do not appear on this chart. There is no indication of a water-way between the points where it joins Sonoma Creek and the southerly end of the high land of a water-way connecting Napa River with San Pablo Bay; and my testimony would be the same between this point and the south end of the Island. There is no water-way, as indicated on this map, in the area traversing Mare Island from Napa River, between the entrance of Boat Cut-Off or Dutchman's Slough and the south end of the Island. This document is the latest official map of the Coast and Geodetic Survey. The name "Island No. 1," to the north of Mare Island was removed from our chart of 1922 on receipt of better information. The names "Island No. 1 and Island No. 2" have never appeared on any of our surveys. The only thing I can say as to the basis, if any, which the map-maker had to put it on the map was that a surveyor made an attempt to obtain local names and from some authority obtained these designations which he placed on this map.

(The document was received in evidence as "Plaintiff's Exhibit L-30".)

WITNESS continuing: Comparing the two last exhibits, the appearance of San Pablo Bay in the shape of a crescent indicates that it has been subject to wave action and that wave action and [213] the

(Testimony of Alfred Modesto Sobieralski.)

other processes, due to deposits and erosion have come to an equilibrium, a state of balance, indicating a degree of permanence to that area. Our earlier surveys of this area indicate that such a state of balance or equilibrium between eroding and upbuilding forces existed in the past and the condition, I think, is due to the preservation of a state of balance or equilibrium between the destructive forces of the waves and the upbuilding forces of the current.

In my work, I come in contact with members of the Beach Erosion Board, particularly the expert members of the Board, such as Professor Faville, Professor Johnson and Mr. Jelineau, who are authorities on the theory of shore processes, and in the designing and construction of works for the preservation of beaches; and I think practically most of their investigations and designs are based on data furnished by the United States Coast and Geodetic Survey.

Q. From a perusal of those authorities, can you state what official charts were available to the Smith Board of the charts that have been introduced—what were available to the Smith Board in 1850?

A. Of the official charts, none except the map by Fremont, and such maps as have been covered.

Q. Would the Beechey chart have been available, the chart of the British Admiralty?

A. Yes.

Q. Would the Wilkes chart have been available to them?

A. Yes.

(Testimony of Alfred Modesto Sobieralski.)

Q. Would the Ringgold charts have been available to them?

A. I am not sure of the date of that.

Q. Would the Cutts chart have been available to them?

A. I don't know anything about the date of the board which you mention.

Q. The Smith Board, I believe, was organized in the early part of 1850. The Smith Board report has already been put in evidence.

Mr. BURKE: He evidently don't know what the Smith Board was.

Mr. PECKHAM: Q. Do you recall that the Smith Board was a Board that was formed to report on fortifications on the Western Coast, here?

A. Yes. I have handled some correspondence from [214] Colonel Smith, who was chairman of this board, but I don't remember the date.

Mr. PECKHAM: I believe the board reported on March 3, 1850, did it not, Mr. Burke?

Mr. BURKE: I think about that date. But I don't see how he had any correspondence.

A. I handled copies of that correspondence.

Mr. PECKHAM: Q. Do you know of any other official charts than those that would have been available to that board?

A. There were no official charts available at that time.

Q. The only charts that would have been available to them are the charts that have been introduced here of that date, or prior to that date. Is that correct?

A. That is of the official charts?

(Testimony of Alfred Modesto Sobieralski.)

Q. Yes.

A. Yes.

Q. The same thing would be true as to the report of the Sloat Board in 1852, that the only charts that would have been available to them would be the charts that have been introduced in evidence here as of that date or previous to that date?

A. That is, of 1852 the only charts that were available of any kind were the Beechey chart, the Wilkes chart, and the Ringgold charts.

Mr. PECKHAM: Take the witness.

Cross-Examination by Mr. Burke.

Captain Beechey was a hydrographer in the British Navy, and at the time this survey was made, he was under orders to continue Vancouver surveys, but through some accident or other, he was held at San Francisco, and during that time made surveys.

The Wilkes Survey was made under authority of Congress, the President and the Navy Department, in the year 1841. I do not know of any authority that Ringgold had for making his report. I am forty-nine years of age. I first made acquaintance with the lands in controversy about three days ago. All my knowledge of the vicinity and of the islands and matters that I have testified to comes from maps.

Q. So all your knowledge of the vicinity and of the islands and matters that you have testified to come not from any personal knowledge of your own?

A. They come from the map. [215]

Q. I asked you if they come from any personal knowledge of your own?

(Testimony of Alfred Modesto Sobieralski.)

A. Personal knowledge of maps.

Q. Of your own?

A. My contact with the maps.

Q. Let us be frank; you have no knowledge of the subject matter of these surveys, except such as you have gleaned from reports and archives extending back to the year 1723, or something like that, have you?

A. Well, my handling of these maps in comparison with other maps has certainly given me a personal knowledge of the character of the work.

Q. Do you call information from maps in archives knowledge?

A. I think so.

WITNESS continuing: In my previous testimony where I have stated and reiterated that none of the maps, charts, or plats, officially, or otherwise, indicate the presence of any water-way traversing the land in controversy from Napa Creek to San Pablo Bay, I was using the generally accepted term of water-way, which is any body of water or stream which would be long and narrow. A body of water would have to be long and narrow to be a water-way, as distinguished from a river or some other stream. The term "stream" generally presupposes running water. There is no definite limit that has ever been set by any authority as to the width it must be in order to be a stream. In my definition of the term "water-way" and "stream", I do not wish to be understood as saying it must be navigable water. I should say that any water-way or stream which left a visible bed would cover my use of the term, and

(Testimony of Alfred Modesto Sobieralski.)

would certainly imply mean high water at the plane of mean high water. I would not want to be quoted as an authority as to whether overflow land within the definition of Mr. Justice Field was either a water course or a stream—I am an authority only on maps. I believe the accepted definition of "tide land" is the area between low water and mean high water mark. I am not an expert on tide lands. The definition of "salt marsh" as being the extension of "tide land" agrees [216] with my idea of what salt marsh is, except that I believe there is a distinction between marsh and tide land coming in as a matter of relative position to the tidal plane. From my own knowledge, I would say the high water mark at Mare Island is 5.8 feet above the plane of mean lower low water. The Coast and Geodetic Survey considers ordinary high tide the plane of mean high water. A neap tide and a spring tide is a tide occurring twice a month. What we consider the mean high water line is the average of all the high water tides over a long period of time, generally considered, for a good determination, nineteen years. One could determine the plan of high water within varying degrees to precision by a comparatively short observation, but the longer the observation, the more accurate the determination of the plane. High tide passing over the surface of the flat overflowed land would indicate the point that it reached possibly by debris and drift wood and various deposits of that kind. I would not consider the presence of drift wood on a flat surface .65 of a foot above the ordinary high water mark as a limit of the ordinary

(Testimony of Alfred Modesto Sobieralski.)

high tide. In land that is vertical, the Coast Survey sometimes used the markings of the height of the tide, but official instructions specify that the surveyor should carefully study the tide and the appearance of the land before using such a method and giving them approximate methods for determining the plane of high water with relation to the plane of the tide at any time. If there was a stream or body of water when the tide stood at mean high water between the high land or the upland mark of Mare Island and another point to the north sufficient to permit a duck to swim from Napa Creek to San Pablo Bay, I am sure it would have been shown on the survey of that area. I know what tules are. My experience has been that they usually grow around fresh water. I would not consider that a body of water across the northern boundary of Mare Island from San Pablo Bay to Napa Creek was a waterway or a stream just from the fact that tules grew in it. I have never seen tules growing in [217] dry land. In the letter handed me by Mr. Burke, received by him from Director Patton of the Coast Survey, he specifies 6.1 feet above the datum of mean lower low water at *Mayor* Island and specifies the mean higher high water above the same datum as 6.6 feet. Extraordinary high water, what we term extreme high water would arise only at some unusual condition of wind and possibly floods or some other unusual circumstances. The higher high water would not be designated as extraordinary high water. [218]

When I stated with respect to "Plaintiff's Ex-

(Testimony of Alfred Modesto Sobieralski.)

hibit L-" that the designations "Island No. 1 and Mare Island" had been placed upon those plats by reason of local name, it might have been an arbitrary designation by a surveyor. It is also stated in the record that the names Island No. 1 and Island No. 2 were applied to a newly reclaimed area. It is not a fact that Island No. 1 is here designated before it was reclaimed at all; the same time that the name Island No. 1 was applied, the dykes were applied to the map. When I applied my theory to the specific instance of Island No. 1, I am quoting the record of the compilation of this chart which was compiled in 1903 and published some time afterwards.

Q. Have you read the report of the Cadastral Engineer, Francis E. Joy, who made the report under which these two tracts of land, 5, 6, and 9, and 34, were patented to the State of California?

A. I have not. I am not interested in those surveys. I am only interpreting the surveys made by the Coast and Geodetic Survey.

Q. I am going to read a small portion of that report to you, and I am going to ask you to interpret it under the same theory that you interpreted the maps beginning 1723 down to the map of 1931: "The portion of this fractional township east of the main channel of Napa River (not including lands previously surveyed), and all of that portion lying west of Napa River and North of Tract No. 38, Mare Island Navy Yard, is hereby returned as

(Testimony of Alfred Modesto Sobieralski.)

swamp and overflow within the meaning of the Swamp Act of September 28, 1850. West of the main channel of Napa River I have surveyed the land in two bodies, one of which I have termed 'Island No. 1 and Mare Island', the second and smaller is covered by portions of sections 3, 4, 5, 9, and 10." Now would it be your idea that Mr. Joy so designated these same tracts of land in the year 1923 by reason of their local reputation, or because they had been called by the inhabitants of the vicinity as Island No. 1 or Island No. 2, or because he found, under his investigation as civil engineer to determine swamp and overflow qual- [219] ity of land, that there were two islands, namely, Island No. 1 and Mare Island? Now is it your interpretation of that report that he designated those tracts as Island No. 1 and Mare Island by reason of their local reputation, or by reason of their ancient history?

A. As I said before, he appears to apply those names arbitrarily for designation the tracts of land; I do not think there is any evidence in the report that he had any authority either way. He states that he designated one section as Island No. 1, and the other as Island No. 2.

Q. Assuming that he did apply them arbitrarily, he might have called one the Irish Republic and the other the Good See, but the fact that they are two islands would remain.

A. I do not think he made the statement they are two islands.

(Testimony of Alfred Modesto Sobieralski.)

Q. Do you think he would go to work and take one island extending from Carquinez Straits to Sonoma Creek and say it was two islands?

A. That has been done. We have any number of charts which show names of two islands.

Q. There was not two names on this island, was there?

A. There was while Island No. 1 was on the chart, yes.

Q. We will pass the Joy report and we will take the certified plat of Township 4, Range 3M. Mount Diablo, which is this portion that I show you here of Survey 569, that is of Solano County, and is included in Napa County.

Mr. BURKE: What is your interpretation of the reason that the official surveyor of the United States delegated to ascertain and determine the character of this land designated this area as Island No. 1?

A. The only thing I can see that he did was to designate that area to distinguish it from some other area.

WITNESS continuing: If the map of the official surveyor of the United States showed water-ways or streams bounding the area which he called an island, there would not be any difficulty about distinguishing these two terms from a stream. From my interpreta- [220] tion of the maps extending back to 1723, there is an area north of Mare Island of what we indicate on our charts as marsh land along the east side of what is now the "Navy Yard", which

(Testimony of Alfred Modesto Sobieralski.)

is analogous to the land to the northerly. I will say that the maps from 1851 on all show an area of marsh land along the east side of what is now the Navy Yard that is of the same character as the land to the northerly, including all land northerly of what is now Mare Island Navy Yard. It is my idea that the land, the swamp and overflow land on the easterly side of Mare Island were identical in character with the lands northerly, extending northerly from the Machine Shop. I have read the second executive order reserving Mare Island, together with appendages of tule and marsh ordinarily reported to belong to Mare Island and I would say that it is all land extending from the Machine Shop bounded by the mean high water line and this area that I spoke of before along the east side. I can point out on the Map of 1856 the appendages of tule and marsh belonging to Mare Island. I interpret that phrase to mean along the mean high water line along the south shore of this area extending to Sonoma Creek, and then whatever is determined as ordinary high water line following the mean high water line back to Napa River.

As far as the interpretation of the map of the Coast Survey is concerned, we do not attempt to make a classification of whether an area is swamp and overflow. If some authority decides it is swamp overflow land, it would not affect our maps.

Referring to the so-called Bissell Conveyance of Mare Island, including all tule land, low land or

(Testimony of Alfred Modesto Sobieralski.)

marsh land claimed to belong or ever claimed to have belonged to Mare Island, I would interpret a statement of that kind as including the area bounded by the mean high water line along San Pablo Bay to the first creek or stream or water-way which indents that shore and meantime following the high water line back to Napa River and that would apply to the line on the easterly side of Mare Island as swamp and overflow land out [221] to the left. I have not been called on to interpret the words "appendages of land." If you want my personal opinion, I would say that it brings up the idea of low land attached to some higher land. I think that there is a conveyance of Mare Island including tule land and marsh. My idea of the word "including" is that it is a term put in to clarify the definition of Mare Island.

Referring to the Spanish Maps: I find an analogy in the tule line of the lands, whatever they were, which were depicted upon those ancient maps. They are analogous to Mare Island in that they depict an unbroken area of shore line—an unbroken stretch of shore line, from the vicinity of what is now Mare Island Straits to the first large stream to the westward.

Q. Is it your idea that if there are a number of these exhibits here that are produced by the Government showing what you interpret to be a continuously unbroken body of water, they are more valuable than are the Coast Surveys made by your Department, or by the Interior Department, that

(Testimony of Alfred Modesto Sobieralski.)

show an intervening space between Island No. 1 and 34? If you do not understand the question, I will illustrate by handing you the United States Geological Survey, issued by the Department of the Interior in 1916, and ask you to note the designation of Mare Island at this end, and the designation of the other area as Island No. 1, with an intervening space between the two islands, and ask you if you consider that a fracture or an indentation in the coast line between Carquinez Straits and Sonoma Creek?

A. This map plainly shows a dyke surrounding the area marked Island No. 1. It shows an area of marsh land between Mare Island and Island No. 1. The mean high water line is shown unbroken from Mare Island. It positively does not show a break in the coast line between Carquinez Point and Sonoma Creek. It shows an area of marsh land above mean high water between Mare Island and the Island designated on the map as No. 1. [222]

Mr. BURKE: Q. You said something about the reclamation of Island No. 1. I call your attention to these 1000 tidal inlets traversing Island No. 1 in every direction, and I ask whether that indicates to your mind that the land is reclaimed or unreclaimed?

A. The map plainly indicates dykes throughout this area. Putting in a dyke is one of the processes of reclamation. I did not mean to indicate in my testimony that one of these sloughs north of 34 was Napa Creek.

(Testimony of Alfred Modesto Sobieralski.)

Redirect Examination.

When I stated that I found no record of any water-way traversing Mare Island from San Pablo Bay to Mare Island Strait, I understood a water-way to be a body of water of a fixed course whose banks would be visible to a surveyor. I did not understand it to be a [223] passage way for ships, or navigable. The word "water-way" conveys to me a notion of permanence or a stream or water-way which had banks of enough permanence so that it would remain there for some time. It also conveyed the notion of continuity, but I did not understand it as having reference to navigability or passage way for ships or vessels. My reference to mean high water, as determined by taking the average of high tides over a period of nineteen (19) years would be the scientific, accurate mean high tide and that could only be obtained by observing the tide during the entire moon's orbit. It takes nineteen (19) years for what I would call a primary determination or for scientific tidal accuracy.

For the purpose of surveys, no such observation is practical for making a survey of a place like Mare Island, but special publications issued by the Coast Survey on tidal data specify that the plane of high water can be determined within one-tenth of a foot by a month of observation, which refers to a primary determination, and within a half a foot by day observation. All of the officers of the coast survey, in making tidal observations use the tides in their hydrographic surveys, and instructions in their

(Testimony of Alfred Modesto Sobieralski.)

topographic work specify that they should acquaint themselves with the stage of the tide at all times when they are working, from their data. A neap tide refers only to two tides which occur during the month and is the lowest of the high water during a month. A spring tide is the opposite of neap, the line of the highest tide during the month.

In plain use, the term "neap" would be considered lower than the mean high tide. Neap tide at Mare Island is roughly about a foot lower than the mean high water and the mean high water as shown on the map is one foot higher than the mean of the neap tide. From my knowledge of the maps which I have identified, I found the areas actually on the land very much as indicated on the maps. There was no difficulty in recognizing the various parts and points [224] of the island. I notice that many of the features that are recently plotted are indicated on the latest Coast and Geodetic Survey Charts and the general condition of the land is the same as what my mental picture of the land would be.

Witness Recalled on Direct Examination.

The document now shown to me is a copy of a geological survey quadrangle entitled: "California-Napa Quadrangle." The edition of May, 1902, reprinted March, 1913.

The label on the white area to the north end of Mare Island area, Island No. 1, is a map referred to in the notes as the source of the label Island No. 1 on the Coast and Geodetic Chart. The white

(Testimony of Alfred Modesto Sobieralski.)

area is continuous from the lower end of Mare Island, where the Navy Yard is located, across the narrow neck from Sonoma Creek. The heavy blue line at the outside of the white area on the San Pablo side is a representation of the mean high water line. The heavy blue line on the left-hand side, between Mare Island Straits and the land area represents the mean high water line. The representation of cross-hatching inside the blue line at the neck of the Isthmus would represent a dyke or some ridge. The blue cross-hatching represents marsh land. The brown cross-hatching surrounding the white area represents a dyke or some ridge of some elevation.

(The document was received in evidence as "Plaintiff's Exhibit L-31".)

Cross-Examination by Burke.

Soundings are made from a boat drawing very little water, not over a foot, so that in approaching Mare Island from the middle of Napa Creek, when the bow of the boat reached water that was not more than a foot deep, it would stop there. If it was impossible to push the boat across the overflowed portion of Mare Island, no soundings would be taken, altho it might be covered by water, so that the sounding area is not indicated when the sounding party has [225] reached a point which prevented it from proceeding further with the boat.

Referring to the description of Mare Island, as made by the Sloat Board of Surveyors in 1852, pur-

(Testimony of Alfred Modesto Sobieralski.)

suant to act of 1852, I would say that the large body of tule land that bounded Mare Island on the north, as shown on "Plaintiff's Exhibit L-23", Chart 5533, is approximately one-eighth of a mile from the Machine Shop. I believe that the reference to "the large body of tule extending to Mare Island from the Machine Shop", as described in the field notes of the Freeman Survey, made in 1877, is probably the same tule line that the Sloat Board referred to.

Referring to the map dated September 19, 1910, marked: "Defendants' Exhibit 2" for identification, the northern line of that map, marked "Shore Line 1852", extending from San Pablo Bay across the northern end of high land north of Mare Island appears in general with the same line as depicted upon all the other maps that I know of in contour and sinuosity.

Q. Now, assuming that that map was correct, would you say that that shore line abutted land or abutted water?

A. Abutted water.

Assuming this map to be correct, there was a shore line that extended from San Pablo Bay to Napa Creek that did interrupt the continuity of the coast line between Carquinez Point and Sonoma Creek.

The COURT: What is No. 2 for identification?

Mr. BURKE: The McKay Survey of September 19, 1910.

Q. I show you Defendants' Exhibit for identification 3, which is endorsed "C 242, File 5402, U. S.

(Testimony of Alfred Modesto Sobieralski.)

Navy Yard, Mare Island, Cal., Area North of Yard to be Filled by Dredger, Submitted," and ask you, taking the line extending from Machine Shop on Napa Creek, and extending to San Pablo Bay, how is it marked?

A. "Line of high land." [226]

Q. I show you Defendants' Exhibit 4 for identification, Map of Mare Island between Steam Engineering Buildings and Swamp and Overflowed Land Survey No. 569, etc., C 188, and I ask you if that indicates the shore line extending from Napa Creek to San Pablo Bay, and if it is so marked?

A. There is a dotted line here which goes over some places of considerable elevation, and is marked "1863 Shore Line".

Q. 1863 Shore Line?

A. Yes.

Q. I show you Defendants' Exhibit No. 5 for identification, Official Map of the State of California by an Act of the Legislature passed March 25, 1853, Complied by W. H. Eddy, 1854, and ask you if that indicates an island marked "Mare Island."

A. Yes.

Q. Does it indicate a water course to the northern part extending from Mare Island Straits to San Pablo Bay?

A. There is a line there which could be interpreted as a water way.

Q. It could be interpreted?

A. Yes.

(Testimony of Alfred Modesto Sobieralski.)

Q. But you would not interpret it so?

A. It might be some other line.

Q. But the chances are you think that it indicates a water course?

A. Yes. I might say in connection with that that there might be something on the original which would throw some further light on the subject.

Q. It is a certified copy, you observe?

A. It is a photographic copy, but there might be colors or some other things.

Q. And there might not, also?

A. I will admit that.

Q. I will show you Defendants' Exhibit 6 for identification, a map of the United States Navy Yard, Mare Island, showing conditions on June 30, 1925, that is only a few years ago, and ask you if there is indicated thereon the high water line extending from Napa Creek to San Pablo Bay?

A. I find a line which extends part way across San Pablo Bay——

Q. Where does it stop, take your pencil and mark it? [227]

A. It stops here, and there is another line out here.

Q. Put a mark on it and mark it with an "X". How is it marked?

A. It says "Original high water line," here, but there is another line here which says "Mean High Water Line."

Q. Is that a continuation of it?

A. No, they are just joined.

(Testimony of Alfred Modesto Sobieralski.)

Q. I show you Defendants' Exhibit 7 for identification, entitled "Map of portion of Mare Island showing location of old shore line west of the Steam Engineering Building, February, 1906," and which reads, "The line of upland and tule in 1863 is shown by a heavy double-dotted-and-dashed line," would that map indicate anything to you as an expert as to the shore line?

A. This does not say where they got the information as to the line of upland.

Q. These maps come from the Commandant's Office, engineers of the Navy who have been in possession of this land for 52 years, on the ground, and making maps of it; that ought to be pretty good authority, shouldn't it? Don't you think it would be as good authority as a man at a desk in Washington depicting areas of land from old maps? I leave it to you.

A. They have to get that line from some other map, and they are given those maps.

Q. I did not ask you that? Does that map indicate——

Mr. PECKHAM: I must protest against this interrupting of the witness every time he starts to answer.

Mr. BURKE: His answer was not responsive, I am asking him if that indicates anything to his mind about the shore line as indicated thereon, not what other maps show, or whether this be right or wrong.

(Testimony of Alfred Modesto Sobieralski.)

A. The land that you ask about is the line of upland and tule in 1863, which runs across high land.

Q. From where?

A. It runs across high land.

Q. From where?

A. From a point near the Machine Shop, and ends——

Q. (Interrupting) It ends at San Pablo Bay, does it not?

A. No, it does not run to San Pablo Bay. [228]

Q. Now, I show you Defendants' Exhibit 8 for identification, which reads "Portion of Mare Island, Cal., prepared to accompany papers relating to claim of E. H. Sawyer to 164.55 acres of swamp and overflowed land. Black lines are from Government survey made in 1900. Machine Shop located from survey made by James E. Freeman, Deputy Surveyor, July, 1877, under instructions from the U. S. Surveyor General. Green lines show area surveyed by H. Patton, Surveyor, in June, 1855, of land issued to David N. Darlington by the State of California, March 18, 1857, and is plotted from Patton's notes. Red lines show the same area as green lines, but it is plotted to agree with the survey of the land immediately adjoining on the north, made by William W. Fitch, County Surveyor of Solano County, September 28, 1869, and with the topography as described in Patton's Notes."

Of course, we will furnish all of this later. I ask you if that map indicates anything to you as to the northern boundary of Mare Island?

(Testimony of Alfred Modesto Sobieralski.)

A. There is a line, here, which runs from the Machine Shop part way over to San Pablo Bay, and it says on one side "Edge of upland", and on the other side of the line it says "Scrap piles."

Q. For the purpose of showing the area of Mare Island independent of any proof that has been adduced upon the subject, I call your attention to Defendants' Exhibit 9 for identification, a map of Mare Island Navy Yard, Calif., original purchase and present area, and ask you to look at that map and state what the area of Mare Island is stated thereon to be?

A. It says "Total area south of line A-B"——

Q. Where is that?

A. 897 acres.

Q. Where is A-B?

A. A-B is the line which I will indicate.

Q. This line from the Machine Shop, running across the island?

A. This point.

Q. This indicates that the entire area of Mare Island from that point, the line across to Carquinez Straits, is what?

A. It says the area south of this line is 897 acres. [229]

Q. I call your attention, Mr. Witness, to Defendants' Exhibit 10 for identification, and ask you if it bears the legend, "Map of Mare Island and adjacent marsh lands."

A. Yes.

(Testimony of Alfred Modesto Sobieralski.)

Q. Is that right?

A. Yes.

Q. Does that indicate anything to your technical mind whether the marsh land was a part of Mare Island, or whether it was adjacent and contiguous?

A. I would say that it indicates they are contiguous, but the title does not attempt to delimit the limits of Mare Island.

Q. Are you speaking now as a lawyer, or an expert on maps?

A. I am interpreting that title.

Q. What does "adjacent marsh lands" mean?

A. I would say part of Mare Island.

Q. I am talking about that caption there.

A. Mare Island and adjacent marsh land.

Q. I have called your attention heretofore to the description in the Castro conveyance, and we will turn now to the Act of May 11, 1854, and I will ask you if you are familiar with the description of the land conveyed by that back to the United States?

A. No, I am not.

Q. Well, I will read it to you: "The title and interest of the State of California to and in said portions of the island described in the preceding section as are overflowed beach or swamp lands, on the eastern shore of the said island." Where would that be, on the eastern shore of said island?

A. On the eastern shore would be somewhere along there.

Q. Somewhere along here. Can't you tell where the eastern shore of Mare Island is from that map?

(Testimony of Alfred Modesto Sobieralski.)

A. We have just described the northern shore.

Q. It has not got any eastern shore, has it?

A. This is the east side of the island.

Q. "From the southern point thereof to a parallel intersecting the [230] northern point of the high lands and extending into the waters of the bay or straits, washing the eastern shore of said high lands of the island to ship channel, is hereby relinquished and granted to the United States for the purposes specified in the preceding section." Where, in your judgment, would that parallel intersecting the northern point of the high lands pass?

A. I would interpret it as the point where the Machine Shop was built, in that area, there.

Q. While I think about it, I will ask you to say what the chart 5533 indicates as the ordinary high tide of Mare Island. You will find the table down in the corner.

A. It has a rather elaborate notation regarding the tide. The mean line of high water gives the time of high water; it does not state what the ordinary high water is.

Q. What is that legend about 7 feet and some inches of water?

A. Mean height of higher high water plane above plane of reference at Mare Island 6.9 feet. The one just about refers to the time, 7 hours and 9 minutes —mean high of all high water above plane of reference at Mare Island is given as 6 feet. That is the highest figure. At other points it gives it as 5.6 feet, 5.8 feet.

(Testimony of Alfred Modesto Sobieralski.)

Q. I call your attention to the Freeman Survey. You have seen it, I take it, since you have been here?

A. I am not very familiar with it.

Q. I show you the Freeman map of 1877, and ask you if that map indicates the location of Station 54?

A. Yes.

Q. Can you approximately locate Station 54 upon chart 5533?

A. Yes.

Q. Where would you say it was?

A. It appears to be about due west of the Machine Shop, somewhere in here.

Q. Where would you say Station 138 was, on the Napa River side, and taking the Machine Shop?

A. I do not see any point——

Q. Where would you judge by the distance between the other stations 138 is or was?

A. It looks like it is at the corner of the Machine [231] shop.

Q. Now, assuming that Surveyor General Wagner, in rejecting the Freeman Survey as including an island not a part of Mare Island, said the line of Mare Island would be that drawn from Station 54 on the San Pablo side to Station 138 on the Napa Creek side, what would you say about that—I withdraw that question. What would that opinion, or decision, or statement of United States Surveyor General Wagner on the ground at the time carry

(Testimony of Alfred Modesto Sobieralski.)

to your technical mind as to the northern boundary of Mare Island?

A. I think it very clear that he is talking about a line from Station 54 to 138.

Q. Would that carry to your mind that Surveyor General Wagner had depicted on the Freemont Map the northern boundary of Mare Island?

A. That is a hard one.

Q. That is a hard one to answer, as you have found?

A. He depicted that northern boundary as a property line, but that would not have any influence on the geographical situation.

Q. Is that an opinion of a lawyer or an expert for the Coast Survey?

A. That is giving it as an expert for the Coast Survey. If we had an island marked on a chart and a granting act or deed granting part of the land, or giving it a different name, we would not consider that two islands.

Q. Let us see about that, Mr. Witness. Did you know that the Freeman Survey was made pursuant to the Act of July 1, 1864, which provided for a survey of confined Mexican grants?

A. No, I did not know that.

Q. Did you know that the statute required a publication of that survey after it was returned to the Surveyor General's office?

A. No.

Q. Did you know that it was the duty and jurisdiction of the Surveyor General to decide whether

(Testimony of Alfred Modesto Sobieralski.)

or not a map or survey was correct—that was a statutory duty, did you understand that?

A. I understand that in a general way, yes.

Q. Wouldn't you distinguish between a decision by a statutory of- [232] ficer—wouldn't you give it more weight than you would the act or deed of some draftsman?

A. If I were deciding property lines and geographical features, our Coast Survey would be given much more weight.

Q. Than the decision of any officer?

A. Yes.

Q. How about a court?

A. A court would not make a decision on a geographical feature or a property line.

Q. A court would not make a decision upon a boundary. What is it going to do here, then? Well, I will withdraw that. Assume that subsequent to 1850, pursuant to an Act of Congress donating 500,000 acres of land to California for school purposes, California sold 160 acres of land, and in the map of the same made by the County Surveyor he depicted the northern boundary of Mare Island to be the southern boundary of what is now 34, would that carry to your mind any indication of the northern boundary of Mare Island?

A. As far as property line, it must depict some line, but as far as the geographical feature, it would not have any influence on my decision.

Q. You think that a survey made is a property line, not a statutory line?

(Testimony of Alfred Modesto Sobieralski.)

A. I consider a property line as a statutory line, but as far as interpreting the mean high water line, our own survey would be the criterion which we would follow:

Q. In other words, you will follow your own surveys?

A. Yes.

Q. Is it your understanding that every fact depicted upon that Coast Survey chart 5533 is absolutely correct?

A. No, it is correct to the best of our knowledge.

Q. Now, let us assume that the Court of Appeals of this Circuit has decided that the Court must take judicial cognizance of that chart and find that everything in it is absolutely true and correct, what would you say then?

A. I know the decision you are referring to, but I think if you would read the decision carefully you would see that it does not make such a broad statement. [233]

Q. I have been reading that decision for ten or twelve years, now. I think you are in the wrong department. You ought to go in the Attorney General's Office. Here is a photostatic copy of the letter of Surveyor General Wagner to the Secretary of the Interior, rejecting the Freemont Survey, and pointing out where the true line is.

The COURT: Are you offering that?

Mr. BURKE: I will have it marked Defendants' Exhibit 11 for identification. I read you from

(Testimony of Alfred Modesto Sobieralski.)

the last paragraph of the letter: "I consider the survey incorrect in that it not only includes tracts which are properly islands in themselves, but also embraces a large quantity of tide land, and should be limited to the area contained south of a line run across the island from the vicinity of Station No. 54 to Station No. 138." You have that in mind now?

A. Yes.

Q. You do not care to change your testimony about that?

A. No.

Q. What is your definition of an island?

A. A body of land surrounded by water.

Q. Navigable water?

A. Not necessarily, no.

Q. In other words, an island is a body of land entirely surrounded by water, regardless of its depth?

A. Yes.

Q. What is your definition of tule? I will read you this definition: "Tule, either of two large bulrushes growing abundantly in overflowed land in the southwestern United States, especialy in California, at the junction of the Sacramento and San Joaquin Rivers, where larger tracts are known as tule lands." The Strait of Carquinez is generally in that locality, as you understand it?

A. Yes.

Q. Do you agree with the definition that tules grow on overflowed land?

(Testimony of Alfred Modesto Sobieralski.)

A. My understanding is that tules will not grow on land which is not overflowed at some time or other.

Q. Now, I want to ask you a question, and I am not smart-alecking about it, or trying to be facetious, at all, but I want to illus- [234] trate this question, that where tules and bulrushes grow—are you familiar with the Old Testament?

A. Yes.

Q. Did you ever read that one morning Pharoah's daughter went down to the bulrushes and found Moses floating in the vicinity of the bulrushes?

A. Yes.

Q. That would indicate to you that bulrushes and tule grow on overflowed lands?

A. Yes.

Q. Of a sufficient depth to float upon the surface a ten or twelve pound baby boy in a basket.

A. Yes.

Q. Can you estimate generally the width between the southerly boundary of Island No. 1 as depicted upon Chart 5533 and the northerly boundary of Mare Island, depicted thereupon?

A. The limits of both of them are so indefinite on these charts that they practically are contiguous.

Q. Practically contiguous?

A. Yes.

Q. What is your definition of "contiguous"? Separated?

A. No, joining.

CLERK'S COPY.

TRANSCRIPT OF RECORD

IN TWO VOLUMES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 487

THE UNITED STATES OF AMERICA, PETITIONER

vs.

JAMES E. O'DONNELL ET AL.

Volume II

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 7, 1937.
CERTIORARI GRANTED NOVEMBER 8, 1937

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(Testimony of Alfred Modesto Sobieralski.)

Q. Is it your understanding of the meaning of the word that it does not mean in close proximity?

A. In such close proximity as there is no lost space between them.

Q. Can there be land with any space between that is contiguous?

A. I should think so.

Q. Do you know what the word is made up from?

A. I have studied Latin.

Q. Tell us what it means.

A. I cannot think off-hand of the root.

Q. Isn't it your general understanding it means apart, separated, in close proximity?

A. It brings to my mind the idea of touching.

Q. Of touching?

A. Yes.

Q. In other words, that chair is contiguous to the floor because it touches, is that the idea.

A. I would not use it in that sense.

Q. Are you contiguous to that rail because you are leaning against it?

A. Yes, I think I am. [235]

Q. Are you a part of it?

A. No.

Q. So you are separated?

A. Well, you can play upon words like that.

Q. I am not. I am asking you under your own definition whether you are part of that rail, or whether you are separated.

A. I would also say this post is contiguous to the rail.

(Testimony of Alfred Modesto Sobieralski.)

Q. How many times have you been on the witness stand in your life?

A. This is the first time in my life.

Q. You think that post is contiguous to the rail?

A. Yes.

Q. Why don't you say it is attached?

A. I would say so, but you wanted an example of the word contiguous.

Q. That is, you think the words contiguous and attached have the same meaning?

A. Very nearly.

Q. How nearly?

A. There is some slight distinction.

Q. What is the distinction?

A. When you speak of attached, that means tied to it securely, while contiguous may be separated from it.

Q. May be separated from it?

A. Yes.

Q. I will take the answer. Now, you said there was no difference between salt and fresh water marsh in the definition of the Coast Survey?

A. No.

Q. Do you know anything about the alleged improvements on 34?

A. Only that our charts have.

Q. Take that chart which you say was issued in 1918, does it show a solitary improvement on what we call 34?

A. It shows buildings and roads beyond the Machine Shop?

(Testimony of Alfred Modesto Sobieralski.)

Q. It shows what kind of buildings?

A. It is indicated with a solid black square which indicates prominent buildings.

Q. You know what kind of buildings they are?

A. One distinguished with an outline of the building is considered a building of less prominence than one that is indicated with solid lines. [236]

Q. It is alleged in the 569 bill that there is a dwelling house upon a certain portion of the land. Now, assuming that that dwelling house is a shanty 10 by 12 feet, without windows or doors, would you say that was an improvement on land?

A. That depends on what interpretation you are using. In the legal interpretation I believe it is.

Mr. BURKE: That is all.

Redirect Examination.

Referring to the line marked on "Exhibit 2 for identification", "Shore Line 1852", that line is very close and probably was meant to be the same line on the Cutts map.

Q. By the words "High Water Line, line of High Water, 1852, Shore Line 1852", is that correct?

A. That is what it states on this map, "Shore Line 1852".

Q. Is that or is it not a correct interpretation of that line as depicted on the Cutts map?

A. It is not a correct interpretation of that line.

(Testimony of Alfred Modesto Sobieralski.)

Q. What was the date of that map before you?

A. This map is September, 1919.

Q. Does that map contain any indication of mean high water line at that time?

A. Mean high water line is indicated by the solid line extending around the Island.

Q. Does it contain any indication on it of the map-maker's determination of mean high water line as it existed in 1852?

A. This line is marked "Shore Line, 1852."

Q. Is there any indication on that map of mean high water line in 1852?

A. There is no statement to that effect.

Q. Is there anything on that map that indicates whether the map-maker's judgment of shore line constituted higher high water, mean higher high water, or mean high water, or the line of neap tides?

A. I do not see anything on here which specifies that tide the man was using to interpret the shore line.

Q. I show you Exhibit marked 3 for identification, and ask you [237] what this line is that runs between the corner of Machine Shop as designated on the map and ends in a broken line drawn roughly east and west across the map. Do you know what is indicated by that?

A. I believe that is an interpretation of that same line which is shown on the previous exhibit.

Q. It is a rough drawing of the line as shown on the Cutts Map of the division between marshland and fastland, and that map indicates, does it

(Testimony of Alfred Modesto Sobieralski.)

not, the construction of a levee running from Mare Island Strait in a general northwesterly direction, and intersecting another line of levee or dyke which intersects it at the southwest corner of the map. Is that correct?

A. Yes.

Q. Exhibit 4 for identification seems to be a map made in 1906, does it not?

A. Yes.

Q. And by its legend seems to be a map of Mare Island between Steam Engineering Building and the swamp and overflowed lands, Survey 569?

A. Yes.

Q. I find on that a dotted-and-dashed line passing from the Machine Shop generally in the neighborhood of the Machine Shop, and ending in a broken line at 109 contour—by the way, will you explain to the Court what the 109 contour is, what is the significance of that 109?

A. 109 is a line of equal elevation of 109 feet above the plane of reference between mean lower low water.

Q. And the 100 indicates what?

A. 100 was accepted as an arbitrary figure for the elevation of approximately this plane which is known, and 109 indicates 9 feet above that plane.

Q. Then the fact that this broken line ends between contour 109 and contour 110 indicates that it starts between 9 and 10 four feet above lower low water. Is that correct?

A. Yes.

(Testimony of Alfred Modesto Sobieralski.)

Q. And the line intersects the 110-foot contour, 111-foot contour, 112-foot contour, and 113-foot contour, and 112-foot contour, and where it passes off and intersects all the contours down to mean lower low water. Is that correct?

A. Yes.

Q. Do you find anything on that line that says 1863 shore line [238] that represents the judgment of the map-maker that that was the purpose of the line from the Cutts Survey?

Mr. BURKE: Do you call the engineer the map-maker?

Mr. PECKHAM: Whoever made this map?

Mr. BURKE: Do you mean to say an engineer who makes a survey and runs the courses and distances, metes and bounds, is a map-maker?

Mr. PECKHAM: The person who made this map is a map-maker. Undoubtedly, it was made under the direction of an engineer. Do you find anything on this map to indicate whether the line marked "Shore line 1863" or "'63 shore line" is the map-maker's judgment, that that is the location of high water line, higher high water line, mean high water line, or the line of neap tide?

A. No, there is nothing to indicate what tides are referred to.

Q. If that line is the line indicated on the Coast Survey, is that statement, "1863 shore line," a correct or an incorrect interpretation of that line on the Cutts Survey?

(Testimony of Alfred Modesto Sobieralski.)

A. If this line is the one from the Cutts Survey, it is not a correct interpretation.

Q. So that the map-maker in 1906, to the extent that he represented the line as the shore line of 1863, would have been mistaken in placing the shore line that was sought to be represented by the line of the Cutts Survey?

A. Yes.

Q. Would that also be true as to the correctness or incorrectness of his interpretation of the line as indicated on the Rogers Survey of 1856?

A. If that line were interpreted as the shore line it would be an incorrect interpretation.

Q. Directing your attention to Exhibit 5 for identification, I will ask you if that purports to be a map based upon a survey made by or under the direction of the map-maker?

A. The note states here it was published for R. A. Eddy, Marysville, California, and then gives authorities. It says the coast line is from data furnished from the U. S. Coast Survey.

Q. Then the map, as I understand, is simply a compilation from the [239] data supplied by the Coast Survey maps that were made under the authority of the Coast Survey prior to that time?

A. That is what the statement here says, regarding the coast line, from the Coast Survey office at Washington, and includes the work of 1852.

Q. Does it purport to be a representation of a survey made by or under the direction of the map-maker?

A. No, it states "Compiled by."

(Testimony of Alfred Modesto Sobieralski.)

Q. Now, I direct your attention to a representation of Mare Island on this map, and indicate to you a white line purporting to cut the isthmus or neck of Mare Island; does that line correspond with the line of fastland as indicated on the Cutts or Rogers Survey?

A. It apparently does at the northern end of the high land.

Q. Directing your attention to the Machine Shop point as represented on the top of Mare Island, and placing that as the eastern-most end of the line of fastland dividing fastland from marsh land on the Cutts and Rogers Surveys, does that white line across the isthmus or neck correspond to that line?

A. It appears to be somewhat further north.

Q. Do you know the general location on that map or swamp and overflowed No. 34?

A. Very approximately, yes.

Q. Is that line north or south of the south boundary of 34?

A. It apparently is to the northward of the south boundary.

Q. Do you find indicated in that location on any map, or any of the maps that have heretofore been introduced any indication of a water course in that neighborhood?

A. None of the Coast Survey maps indicate any water course in that neighborhood.

Q. Now, on Exhibit No. 6 for identification, the line marked with an "X" at the left-hand border of that map, placed so it points north, is labeled

(Testimony of Alfred Modesto Sobieralski.)

"Mean high water," and the datum is given, 105.6, and that indicates that the map-maker located that line, does it not, as mean high water, and that the line of the high water was [240] 105.6 above the datum plane, which is 100 feet below mean lower low water. Is that correct?

A. Yes.

Q. Now, here is a broken line running from the northwest corner of the Machine Shop over to a place called tank, and it is marked "Original high water line." Do you find that?

A. Yes.

Q. Now, this map, by the way, was made—it bears date 1925?

A. Yes.

Q. That represented the judgment of the map-maker at that time that that was the high water line, the original high water line at Mare Island, does it not?

A. Yes.

Q. Do you find anything on that map that indicates whether he intended by that high water line, highest high water line, higher high water line, mean higher high water line, or mean high water line, or the line of the neap tide?

A. There is nothing on this map which indicates what plane he referred to.

Mr. BURKE: You are referring to water on the north end of Mare Island, as depicted on 5533, aren't you?

(Testimony of Alfred Modesto Sobieralski.)

Mr. PECKHAM: I am referring to Exhibit 6 for identification.

Mr. BURKE: Is there anything on the map to indicate whether it is low water or high water?

Mr. PECKHAM: I understand there is nothing on the map to indicate what is meant by high water line. Is that correct?

A. There is nothing on the map to indicate which plane he was referring to.

Q. By the way, does that line that was last called to your attention, original high water line, indicate on the map whether it is a surveyed line, or not?

A. There is nothing to indicate it has been surveyed.

Q. Directing your attention to Defendants' Exhibit No. 7 for identification, I find depicted a dotted-and-dashed line ending over here between 109 and 110 contours, indicated as line of upland and tule in 1863. Is that correct?

A. Yes. [241]

Q. Is that what is supposed to be represented by that line?

A. There is a further note down in the title.

Q. In the title of the map?

A. Yes.

Q. Reading, "The line of upland and tule in 1863 is shown by a heavy double-dotted-and-dashed line"?

A. Yes.

Q. Can you state whether or not that is the line indicated as the dividing line between marsh and fastland in the Rogers Survey and the Cutts Survey?

(Testimony of Alfred Modesto Sobieralski.)

A. It closely approximates that line. Without a very careful comparison I could not say definitely that it is that line, but from its general shape I would say it agrees very closely with that line.

Q. The line apparently crosses contour 110, 111, 112, 113, cuts across 112 again, then cuts across 113 again, and cuts across 114, 113, 112, 111, 110, 109, etc., to its end in the northeast corner of the Machine Shop. What is the significance of this contour on this map?

A. It appears to me that that line possibly cannot go across these elevations.

Q. These elevations represent, do they not, the elevation of the land at the point where the dotted line crosses them above the datum plane, which is 100 feet below mean low water. Is that correct?

A. Yes.

Q. It is found first between 109 and 110 contours, which is between 9 and 10 feet above lower low water?

A. Yes.

Q. Where it crosses 113 and 114, that it is 13 and 14 feet above lower low water. Is that correct?

A. Yes.

Q. From that fact, can you say whether or not it is possible or improbable that that truly represents the line of mean higher high water in 1863?

A. I do not see how it could possibly represent the line of mean high water in 1863.

Mr. PECKHAM: I think that is all. [242]

(Testimony of Alfred Modesto Sobieralski.)

Recross Examination.

Mr. BURKE: Q. Do you consider your judgment of the accuracy of the map of which you were last talking today from an inspection, and from surmise, and from opinion, and from your thought, superior to that of the map-maker who made it in 1863 while on the ground? You say the map-maker did not mean that, and did not mean anything, he did not intend to say "shore line" when he said "shore line"?

Mr. PECKHAM: I think that map, Exhibit 7, is dated 1906. You said 1863 all the time.

Mr. BURKE: I will revise the question.

Q. Do you consider your judgment of the accuracy of maps today better than the judgment of the map-maker who made those maps their respective dates?

A. These maps are conflicting——

Q. Just a moment, I asked you if you considered your judgment as to the designation of the maps today better than the judgment of the surveyor or map-maker on the dates they purport to bear?

A. Confining my judgment to these maps, I would say yes.

Q. You consider your judgment better?

A. Than these maps that have been considered, yes.

Mr. BURKE: That will be all. [243]

TESTIMONY OF EDGAR E. LONG.
Witness for Plaintiff.

I am the Assessor of the County of Solano. My office is in the Court House at Fairfield. I have been such Assessor since January, 1899. I am familiar with the records of that office regarding assessments of what is now known as Mare Island. During my own time as Assessor or in the time of my predecessors, as disclosed by my office records, there is no record that what is known as Swamp and Overflow Survey No. 34 has ever been returned by the persons claiming the same for assessment. Since my term in office, the records do not show that any part of that property has ever been assessed or that it has even been assessed since March, 1928. My records do not show that any patentees of the Government to this property have ever returned it for assessment to my office.

Cross Examination.

Mr. BURKE: Q. I show you a certificate of redemption from tax sale made in the year 1873 by the State. Does your office record show anything about that?

A. It does not.

Mr. BURKE: I ask that that be marked for identification, if your Honor please.

(The certificate of redemption is marked "Defendants' Exhibit 1 for identification.")

TESTIMONY OF GUSTAVE STAHL.
Witness for Plaintiff.

I live at 138 25th Avenue, San Francisco. I am a lawyer, practicing in San Francisco, and am admitted to practice in all the Courts of California and in the Courts of the State of New York. I have also been admitted to practice law in Guatemala. I am familiar with the legal terms in use in Mexico and Guatemala. A part of my business consists of translating Mexican and Spanish documents into English. I have made a translation of "Plaintiff's Exhibit L-1" and produce the translation so made, which is in all respects true [244] and correct. The translation contains the translation of the Spanish words blocked in on the top and on the right-hand side of the map. (The translation was attached to "Plaintiff's Exhibit L-1".) I have translated "Plaintiff's Exhibit L-2" and produce the translation made by me, which is in all respects true and accurate. The pencil markings on the map opposite the Spanish names correspond to the numbers on the list. (The translation was annexed to "Plaintiff's Exhibit L-2".) I have made a translation of the map shown to me, marked "Plaintiff's Exhibit L-3" for identification and I produce the translation so made. (The document was marked as "Plaintiff's Exhibit L-3" for identification.) I have translated the map shown to me and produce the translation which is in all respects true and correct translation from Spanish into English. (The document was annexed and marked "Plaintiff's Exhibit L-4"

(Testimony of Gustave Stahl.)

for identification.) I have translated the map now shown me and produce the translation thereof which is in all respects true and correct. (The map and document were annexed together and marked "Plaintiff's Exhibit L-5" for identification.

Mr. PECKHAM: I call your attention to certain figures here on L-2, 1895. Is that or is it not a typographical error?

A. It should read 1595 rather than 1895.

Mr. PECKHAM: May we have that corrected in the translation, your Honor?

The COURT: Yes.

I have translated Government's Exhibit "D" and produce the translation which is in all respects true and correct. (The translation was annexed to "Plaintiff's Exhibit D".)

Referring to the words "de utilo", the word should probably read "util", which is a form of ownership and consists mainly of having the advantage of whatever fruits or thing is the subject of the ownership. It also involves possession and is a transferable interest. [245]

I am a graduate of the University of Berne. I studied under Mr. Huber, the present President of the International Court of The Hague. I have also studied law at Columbia University Law School and while there was a pupil of Mr. Justice Stone of the Supreme Court and also John Bassett Moore, formerly Judge of the International Court of The Hague. I was practicing in Guatemala for about

(Testimony of Gustave Stahl.)

eight months in the office of Jose Matos, who is an authority on International Law.

Referring to the phrase appearing on the face of what purports to be a grant by Governor Alvarado: "en declarar conio declaro por el presenti", this is a usual phrase in grants in the Spanish language, the proper translation of which is "I declare by these presents". That phrase is unusual in Spanish documents of that character, but it occurs at times—I have come across it.

I have in my business had occasion to translate documents of considerable antiquity and would say that in an old document that particular phrase was more used than it is today.

Referring to the phrase in this deed, "Dn. Victor Castro dueno en propriedad", the translation is: "Owner in ownership". It would not be a proper translation of that purpose to translate it owner in fee simple. The phrase is usually in documents of that character and there is nothing unusual about it. The phrase creates an allodial ownership, which is the fullest type that can be acquired under the Spanish law. [246]

INTRODUCTION OF EXHIBITS.

Mr. PECKHAM: I would like at this time to introduce in evidence the report of Captain Sawyer in 1873, who was one of the members of the Sloat Board.

(The document was received in evidence, marked "Plaintiff's Exhibit M".)

PLAINTIFF'S EXHIBIT M

[Endorsed]: Filed Aug. 11, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

United States of America
[Insignia]
Navy Department

I hereby certify that the annexed printed copy of Report of the Board of Civil Engineers appointed to prepare a plan for the Improvement of the Navy Yard at Mare Island, California, 1873, is a true copy of the original on file in this Department.

In testimony whereof, I have hereunto set my hand and caused the Seal of the Navy Department of the United States to be affixt, at the City of Washington, this 14th day of July, in the year of our Lord one thousand nine hundred and thirty-one, and of the independence of the United States the one hundred and fifty-sixth.

[Seal] C. F. Adams
Secretary.

Report of the
Board of Civil Engineers
Appointed to prepare a plan for
The Improvement of the Navy Yard
at Mare Island, California
1873.

Report of the Board of Civil Engineers Appointed to Prepare a Plan for the Improvement of the Navy Yard at Mare Island, California. 1873.

Bureau of Yards and Docks, Navy Department,
Washington, D. C., September 16, 1873.

Sir: By authority of the honorable Secretary of the Navy, a board of civil engineers has been ordered to assemble at the yard under your command, for the purpose of revising the plan of the yard.

The particular instructions to this board will be submitted to you on the arrival of the members at Mare Island, which will probably be about the 26th or 27th instant.

This board will consist of civil engineers W. P. S. Sanger, Calvin Brown, and F. A. Stratton, and the Bureau will be pleased to have you give them such advice and suggestions as your long experience and great knowledge of navy yard matters will enable you to furnish, and also to allow them such facilities as may be necessary to enable them to perform the duty for which they have been convened.

Respectfully, your obedient servant,

C. R. P. Rodgers,
Chief of Bureau.

Rear-Admiral John Rodgers, U. S. N.,
Commanding Navy-Yard, Mare Island, Cal.

Bureau of Yards and Docks; Navy Department,
Washington, D. C., September 17, 1873.

Sir: By authority of the Secretary of the Navy, you are hereby appointed president of a board of civil engineers, whose duty it will be to carefully examine the navy-yard at Mare Island, California, and to present this Bureau with a well-considered, economical, and coherent plan for its further development, having in view all the needs of a first-class navy-yard, and the harmonious relation of its various departments.

The board will recommend the grades to be established, the streets and roads, and tramways to be prescribed, and the division of the area of the navy-yard, among the several Bureaus of the Navy Department. In this connection it may be desirable to recommend the exchange of some of the buildings now occupied, so that the workshops and storehouses may be grouped for the greater convenience of the different departments. The board will study the water-front of the navy-yard, the character of the channel that washes it, its currents and its deposits, and will recommend the best method of securing convenient quays for vessels to be at, with deep water, and so constructed that they may be scoured by the current and the necessity for dredging may be in some degree avoided.

The enlargement of our facilities for docking, repairing and building ships will receive the most careful consideration of the board.

The board will also consider the best and most economical means of furnishing the navy-yard with an ample supply of fresh water; it will choose a site for a reservoir, and it will consider the cost and feasibility of an artesian well.

It will notify the Vallejo Water Company that it is ready to receive and discuss any project that the company may desire to offer, for supplying Mare Island with water, and that it will report to this Bureau upon such proposals.

The estimate in all that pertains to the supply of water must be carefully stated.

The board will also examine the present expensive and unsatisfactory system of lighting the navy-yard, and recommend such change as will secure greater economy.

The board will present to this Bureau with its report a map and plan like that recently made for League Island, exhibiting the depth of water, the height and character of the land, the assignment of space to the Bureaus, and the structures already existing, using the same symbols as those employed on the League Island map.

It will also present its opinion as to the expediency of substituting concrete for granite in the construction of the quay-walls, and the best means of getting a secure foundation for those walls at a moderate cost. It will also study and report a plan for making roads and paving the streets at Mare Island, suitable to the peculiar soil and weather of

that locality; the system hitherto in use having proved unsatisfactory.

Estimates for the quay-walls and street-making will be submitted for the guidance of the Bureau, and such other estimates as may be required for work of more pressing need.

In carrying out these instructions you will ask the counsel and suggestions of the distinguished officer now in command at Mare Island, whose large knowledge of hydrography and navy-yard administration gives great weight to his opinions.

You are authorized to employ a draughtsman, and a writer, if you think one is necessary. An office at the navy yard will be furnished by the commandant, to whom you will report and exhibit these instructions.

Civil Engineers F. A. Stratton and Calvin Brown have been ordered to report to you as your associates on this board.

When it shall have completed its important duties you will return with Civil Engineer Stratton to Washington.

I have the honor to be, very respectfully, your obedient servant,

C. R. P. Rodgers,
Chief of Bureau.

Chief Civil Engineer W. P. S. Sanger, U. S. N.,
Bureau of Yards and Docks, Washington, D. C.

Navy-Yard, Mare Island, California,
November 19, 1873.

Sir: The board of civil engineers appointed by your order of the 17th of September last to examine the navy-yard at Mare Island and prepare a plan for its future improvement and development on a large scale, has the honor to report that, in obedience to your order, it assembled at said navy-yard on the 29th of September, 1873, and entered at once upon the discharge of the duties assigned to it.

Mare Island is situated near the outlet of Napa Straits, its southern end being opposite the entrance of the Straits of Carquinez, and its westerly shore washed by the waters of San Pablo Bay.

The extreme length of this island, including a large tract of tule on the northern side, and extending toward Napa and Sonoma, is about ten miles, and its average width, including tule, about three-quarters of a mile.

The area of upland is 741 acres, and of the tule-lands on the east side, which will be available for yard purposes, is 135 acres.

No accurate measurement has been made of the area of the tule on the northern side, but an approximate area is 3,973 acres. Its shore at the southern end is precipitous and the land high, the highest point being about 300 feet above high tide. Along the westerly shore, which is washed by the waters of San Pablo Bay, the water is quite shallow, and will admit the approach of no vessels of any size above that of ordinary small boats.

A considerable portion of the southern end of the island is so high as to render it unsuitable for the location of workshops or store-houses, but parts of it will furnish good localities for reservoirs for the storage of water.

Mare Island is the only naval establishment on the whole Pacific coast, and must, in the future, supply all the wants of the Northern and Southern Pacific squadrons, as well as those of the Asiatic seas.

We are fully impressed with its importance, and of the necessity for supplying it with ample facilities of all kinds to meet the many and great demands which may be made upon it.

After an examination of the island, and the various buildings which have already been erected, and a careful study of the wants of the service at this important station, we have prepared a plan for its future improvement, which we think will provide all the various buildings, docks, and other improvements necessary to constitute a complete and perfect naval establishment of first-class size and equipment.

In the arrangement of this plan care has been taken to utilize and preserve, as far as possible, the buildings which have already been erected, and it is found that, with the exception of a small timber-shed, a saw-mill, and three buildings for officers' quarters, all other storehouses, workshops, and quarters can be made to harmonize with and form a part of the general plan which we have adopted.

The buildings thus far erected are good, substantial, well-built structures, and although some of them are now used for purposes different from what we contemplate in the future, they will answer equally well when transferred as we propose, and the changes of occupants will produce no inconvenience, as they will be made only as new buildings are erected.

Accompanying this report are three plans:

No. 1 is a general plan of the whole island, including the tule-lands, and showing a portion of the shore on the opposite of the Napa Straits.

Plan A represents the island, with part of the northern tule, and shows its present condition, with all the buildings and improvements, as they now are, and also the additional buildings, docks, and other improvements which we recommend.

Plan B represents the yard as it will be when all the proposed improvements are completed.

Soon after our arrival the commandant of the yard, Rear-Admiral John Rodgers, informed us that a question had been raised as to the validity of the title held by the United States to the tract of tule on the northerly side of the island leading toward Napa and Sonoma; in fact, that certain parties actually claimed to own a portion of this tule by virtue of a title held from the State of California. This distinguished officer has expended much time and labor in the investigation of this question, and has prepared an elaborate and instructive report to the Chief of the Bureau of Yards and Docks, giving

all the facts which he has been enabled to obtain, and recommending the employment of the United States district attorney to make further research.

We regard this question of title as one of very great importance to the Government, and, as it is purely a legal one, we concur with the admiral in the opinion that the law-agent of the Government is the proper person to pursue the investigation, and that the matter should be committed to his charge without delay. We would further remark that, in case the Government title should prove defective, we regard the possession of this tule as very advantageous, and recommend that immediate steps be taken to secure an undisputed title to the property. This board, however, presumes that the title is in the United States, and acted upon that presumption in preparing the plan for the future improvement of the island.

Upon comparing the chart of soundings taken by the officers of the Coast Survey in 1872 with those made by the commissioners in 1852, it appears that the deep-water lines have receded from the shoreline, while the depths in the channel are not materially changed; the chart of 1872 showing, in a few places, deeper water than that of 1852. The width of the channel is somewhat less, the water having shoaled on the Vallejo side.

We find no record of observations having been taken to ascertain the velocity of the current, but it is the opinion of several persons who have long resided here, and are familiar with the river, that the current is now considerably stronger than for-

merly. The changes which have occurred have doubtless been produced by local causes, and it is believed that when the shore-line of the yard shall have been built, as proposed, the effects of the current along this straight line of wall will be to scour the front and maintain a proper depth of water.

The first step taken in preparing the plan was to establish the location of the front line of the quay-wall. The space between the line of buildings and the present front wall is only 100 feet, which is too limited for large operations. The water along that front is shallow, and the line, when extended, is not sufficiently remote from the line of tule to admit of the basins and railways which we propose, without encroaching too much upon the uplands; and, for these reasons, we have located the front line 100 feet beyond the present line. In connection with this location was the determination of a proper height for the wall and dock coping, and this was found to be a question requiring much careful study, as it was necessary to establish this height at a point which would best serve the purposes of a landing-wharf, and also afford the most numerous opportunities for docking vessels.

The present quay-wall coping is unnecessarily and inconveniently high, rendering it difficult to discharge cargoes from small or medium-sized vessels at low water. And it is too high for the coping of the dry-dock, for at that height nearly two feet of the proposed depth of water on the gate-arch would be lost, except in rare cases of extreme high tide.

The reliable tidal observations which have been made at this yard are rather limited in number, and do not extend over a long period of time. Other observations have been made, but, unfortunately, the plane of reference has been lost. Some important facts, however, have been preserved, from which we have been able to ascertain the points of the highest and lowest tides known to have occurred during a long period of years. With these facts, and such data as could be obtained from the tidal record, we have established the height of the quay-wall and dry-dock coping at a point 1.81 feet below the level of the present quay-wall coping, and we believe this height will be found well adapted to both purposes. It will be a much more convenient height for unloading small vessels at any state of the tide, and will render the dry-dock available for docking vessels of the largest draught of water during the high tides, and secure a larger range for its use during the lesser tides. There is a peculiar feature in the range of tides at this place, and it is this, that there are what are called "greater high tides" and "lesser high tides," and these alternate regularly; and as the time of high water falls about 40 minutes later each day, these "greater high tides" occur sometimes during the day and sometimes during the night, and this feature somewhat complicates the question.

By reference to the accompanying plan A it will be seen from the diagram showing the range of tides that the height of the highest known tide was

2.20 feet below the point established as the heigh
of the dock-coping, and with such a tide there woul
be 30.30 feet of water on the gate-sill of the dock
The lowest known low tide was 12.03 feet below th
coping, and that at such a tide there would be 20.4
feet of water on the sill. The average height of al
the "greater high tides" observed is 4.50 feet belo
the coping, and gives 28 feet of water on the sil
The average of all the "lesser high tides" is 5.4
feet below coping, and gives 27.08 feet of water o
the sill. The average of the "greater low tides" i
9.16 feet below coping, and gives 23.34 feet of wate
on the sill. The average of the "lesser low tides"
is 11.14 feet below coping, and gives 21.36 feet o
water on the sill; and the average of all low tides i
10.10 feet below coping, and gives 22.40 feet of wate
on the gate-sill.

From this examination it is evident that at al
times of high tide there will be at least two feet o
water on the gate-sill in excess of the depth at hig
water on the miter-sills of the stone dry-docks a
the other navy-yards; that vessels drawing 28 fee
may be docked at the highest "greater high tides;"
vessels drawing 27 feet at an average of all hig
tides; and vessels drawing 26.50 feet at an averag
of the "lesser high tides." It is also evident tha
at an average low tide a vessel drawing 22 feet o
water could pass over the sill.

Having located the front line of quay-wall an
established the height of coping, the next proceedin
was to divide the available area of the yard amon

the several bureaus as nearly as possible in proportion to their respective requirements; and as this is the only naval station on this western coast, ample and liberal provision has been made for all the buildings and other improvements which may be needed for the accommodation of the various branches of work to be executed and the large quantities of material and stores which must necessarily accumulate at this point.

The Bureau of Construction and Repair being considered as first in importance, its wants were first carefully considered, and it was apparent that the object of first necessity was to provide ample facilities for constructing, launching, and repairing ships, and for these purposes a suitable number of building-slips and dry-docks must be provided. The question of the kind of dock best adapted to the wants of the service was fully discussed, and the opinion arrived at was unanimous.

Two of the members of this board were also members of a former board of engineers appointed to prepare a plan for the development of League Island, which board fully and thoroughly investigated the subject of dry-docks, and came to the same conclusion, that the system of floating-docks in connection with basins and railways for taking vessels on and off the land, or what might properly be called the American system is the best, and will furnish greater facilities by the expenditure of a given sum of money than any other known plan. This system is no untried experiment, it having been adopted by the Government more than twenty

years ago and been in successful operation since that time at the navy-yards at Kittery, Philadelphia, Pensacola, and Mare Island. At the first-named yard many vessels have been taken on and off the land, and among them one of our largest and heaviest ships, the Franklin, was taken on shore, repaired, and again put afloat with perfect ease and safety.

We, therefore, recommend the adoption of this system at this yard, and have arranged a basin with railways on a scale commensurate with the importance of this great western establishment.

The stone dry-dock now in course of construction, and the basin and railway already built and in use, form proper starting points for the location of works for this bureau; and we propose to occupy that portion of the eastern shore of the yard, south of these, to near the lands occupied for magazine purposes, for the accommodation of works appertaining to the Bureaus of Construction and Repair and Steam-Engineering.

The present shallow basin was designed to receive but one vessel, it being only large enough for one railway, and it is proposed to extend this basin 2,385 feet south, so as to provide space for twenty-four railways. The floating dry-dock now in use is of wood, and at present is in good order, having been recently repaired; it has a lifting power of 4,000 tons, and probably, with the aid of two other sections, which need repairing, a vessel of 4,500 tons displacement might be raised with safety.

This dock will doubtless prove serviceable for several years to come, but we recommend that when it shall again require a thorough repair a new dock be built of iron. The proposed extended basin and railways, in connection with a properly constructed floating-dock, would be capable of raising and taking on shore ships of any size which will probably ever be constructed for our navy. New ships may be built upon the railways, taken upon the floating-dock, and placed afloat without incurring the expense or risk attending the launching of large ships. The stone dry-dock now being constructed will be of ample capacity to receive vessels of the largest class, the depth of water on the gate-sill at high tide being 27.5 feet, or 2.5 feet more than any of the other stone docks in the country. This dock, as before stated, with the floating-dock, basin, and railways, will furnish the necessary facilities for building and repairing twenty-six vessels of the largest class at the same time, thus placing Mare Island, in this respect, on a footing equal or superior to the largest dock-yard of Europe.

At the northern end of the yard we have located a shallow basin in connection with twelve railways for laying vessels on shore when not needed for active service. These railways will store twenty-four ships of the largest class, or a proportionally larger number of smaller size, in safe position, where they may be kept clean and always in condition to be put afloat at a few hours' notice and be ready for active service.

Should the exigencies of war require greater docking facilities, these railways last described, although not very convenient to the workshops and other buildings, might be used for building or repairing purposes.

Immediately south of and adjoining the large shallow basin and railways for building and repairing is a deep basin where large vessels may lie afloat at all times of tide, either when fitting or completing, or when laid up in ordinary, or when undergoing repairs which do not render docking necessary. This basin is 3,318 feet in length, 1,038 feet of which is 449 feet wide, and the remaining 2,280 feet is 410 feet wide, the whole containing 46.30 acres.

South of the deep basin, and separated from it by a causeway 100 feet wide, is the timber-pond, 1,200 feet by 789.37 feet, and containing 21.75 acres. On the east side of the shallow and deep basins and timber-pond is a causeway 100 feet wide, which will afford berths for a large number of vessels to load or discharge cargoes. Along the western side of these basins are the different store-houses, offices, workshops, and manufactories required by this bureau for the accommodation of the various classes of workmen, and for the protection of its large quantities of material and general stores.

The wants of this bureau have been carefully considered, and it is believed that ample provision has been made for the accommodation of the different branches of work. The work-shops are large, and are so grouped together as to bring the works most immediately or intimately connected conveniently

near each other. It is proposed that the space allotted for the saw-mill shall be excavated so as to form a timber-pond beneath the mill, and convenient for the storage of such timber as may be needed for immediate use. When all these store-houses and workshops are erected and supplied with the necessary machinery and tools, they will enable this bureau to employ a very large number of workmen, and to meet all the demands that may be made upon it in cases of extreme emergency. Immediately south of the space allotted to the Bureau Construction and Repair, and along the line of the deep basin, is the area assigned to the Bureau of Steam-Engineering. All the buildings which can ever be required for this bureau are provided for, and those in which the heaviest work will be performed are placed along the line of the basin-wall, so as to be convenient for putting heavy machinery into and out of vessels lying in the basin. Ample shops are provided for all the different branches of work to be performed, and storehouses for the storage of materials and finished work; and the whole establishment is such as to furnish all the facilities required at this station.

The board would have preferred placing the buildings and other improvements intended for the use of the Bureau of Equipment and Recruiting in close connection with those belonging to Construction and Repair and Steam-Engineering; but the form of the available land is such as to render such an arrangement difficult and inconvenient; the line of front being a straight line, and the width of the

island in that portion so limited as to involve the necessity of extending the works of the latter two bureaus along nearly the whole southern part of the entire front.

We have, therefore, devoted the whole eastern shore-line from the principal avenue leading across the island south as far as a point near the area allotted for magazine purposes for the use of the Bureaus of Construction and Repair and Steam-Engineering, and reserved the portion of the water-front from the same avenue north to and including the present steam-works for the use of the Bureaus of Equipment and Recruiting, Provisions and Clothing, Navigation, and Ordinance.

By this arrangement vessels requiring repairs to their hulls or machinery would receive them at the lower basin, and, when completed, would be hauled to the upper end of the yard to complete their equipment and receive their equipment-stores and coal, batteries, and ordnance-stores, and their provision and clothing; all the store-houses and work-shops for these different departments being in close proximity.

Sites have been assigned for all the workshops and store-houses required for the Bureau of Equipment and Recruiting, and they are arranged in a compact and convenient manner.

A large and commodious building is provided for a sale-loft and storage for canvas and sails, another for rigging-loft and storage of fitted rigging and cordage.

Shops for the manufacture of anchors, chains, and galleys, and suitable areas for the storage of anchors and chains, are indicated on the plan, and large store-houses are laid down for the storage of equipment-stores of dismantled vessels.

The coal-house is located near the water-front, and will be so arranged that coal may be received or delivered on board ships in an expeditious and economical manner. The capacity of the coal-depot is 25,000 tons. In the rear of it is another depot for the Bureau of Equipment and Recruiting, capable of receiving 12,000 tons. The rope-walk being necessarily a very long building could not be conveniently grouped with the other buildings of this bureau, but the site selected, although detached, is not far distant, and will be of convenient access.

The space selected for the Bureau of Provisions and Clothing is adjoining that for Equipment and Recruiting, and a sufficient amount of storage has been allowed to meet all requirements of a very large establishment.

This station being so far distant from others, and the wheat on this coast being of such excellent quality, it was deemed proper to provide a large bakery, with store-room for the storage of flour and bread. It is also believed that at a future day it will be found economical for the Department to manufacture the clothing for the seamen of the Navy on this coast, and therefore ample room has been reserved for this purpose.

As the operations of the Bureau of Navigation do not require much space, a portion of one of the

buildings, within the area for Provisions and Clothing, has been assigned for the purpose.

The site selected for the Ordinance Bureau is at the extreme northern end of the upland, and is at present occupied in part by Steam-Engineering.

When the proposed new buildings for the last-named bureau are completed and occupied, workshops now occupied by it will answer an excellent purpose for the Ordnance Bureau, and each will be separate and distinct in itself. For the use of this bureau sites have been selected for all the necessary workshops and store-houses, and abundant space for gun and shot parks.

The magazine, coming also under charge of this bureau, is located near the extreme southern end of the island.

The Bureau of Medicine and Surgery does not require much room for yard purposes, nor does it require the exclusive occupation of water-frontage. We have allotted it a small space near the office-building and dwellings for officers, which will be quite sufficient for its purposes.

The large naval hospital, also under charge of this bureau, is located toward the southern end of the island. It is a fine building, with ample grounds adjacent for cultivation and ornamentation.

The Bureau of Yards and Docks not requiring special use for water-front, has been located in a central position, and provision has been made for its store-houses and workshops, stables, gas-works, and buildings for the preservation of engines, cars, &c.

An area has heretofore been allotted for marine barracks, officers' quarters, and parade-ground. To preserve uniformity in the arrangement of buildings it has been found necessary to move the northern boundary sixty feet farther north, and that boundary has been moved on the plan without detriment to other claims.

As before stated, the area of the upland is 741 acres; of the tule on the east side of the yard, now being fast filled in by the earth excavated from the new dry-dock pit, 135 acres; and of the tule on the northern and western end of the island, about 3,973 acres, making an aggregate of 4,849 acres. The areas appropriated for the various purposes of the navy-yard, according to the plan prepared by the board, are shown by the following table:

	Quay-wall, front	Front on deep basin	Buildings	Land	Streets	Water	Total
Construction and Repair	*Feet*	*Feet*	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*
Workshops, store-houses, and offices	.....	.....	32.146	11.027	25.385	.....	68.558
Dry-dock	.....	.....	.....	.....	1.987	1.385	3.372
Building-ways for twenty-four vessels	.....	.....	.....	25.155	3.782	.....	28.937
Basin for building-ways, (shallow)	.....	.....	.....	.....	6.671	23.744	30.415
Storage-ways for twenty-four to thirty-six vessels	.....	.....	.....	19.153	4.685	.....	23.838
Basin for storage-ways, (shallow)	.....	.....	.....	.....	4.086	9.458	13.544
Timber-basin, (reserve)	.....	.....	.....	.....	6.289	21.746	28.035
Fitting and rigging basin	.....	.....	.....	.....	5.667	20.552	26.219
Total construction and repair	6,580	3,186	32.146	55.335	58.552	76.885	222.918
Steam-Engineering							
Work-shops, store-houses, and offices	.....	.....	13.592	6.159	12.695	.....	32.446
Steam-basin	.....	.....	.....	.....	8.589	26.054	34.643
Total steam engineering	2,365	5,361	13.592	6.159	21.284	26.054	67.089

Equipment and Recruiting	Quay-wall, front	Front on deep basin	Buildings	Land	Streets	Water	Total
	Feet	*Feet*	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*
Workshops, store-houses, and offices	952½	.....	10.755	8.541	12.453	.....	31.749
Ordnance							
Workshops, store-houses, and offices	.....	.....	6.795	12.859	14.872	.....	34.526
Magazine, (land, including buildings)	.....	.....	.....	22.448	6.364	.....	28.812
Total ordnance	887⅔	.....	6.795	35.307	21.236	.....	63.338
Provisions and Clothing							
Workshops, store-houses, and offices	525	.....	4.327	1.481	5.612	.....	11.420
Navigation							
Workshops, store-houses, and offices	.....	.....	.298	.....	.401	.....	.699
Medicine and Surgery							
Workshops, store-houses, and offices	.....	.....	.115	.....	.133	.....	.248
Hospital, (land, including buildings)	.....	.....	.....	31.210	2.095	.....	33.305
Total medicine and surgery	.....	.....	.115	31.210	2.228	.....	33.553

Yards and Docks	Quay-wall, front	Front on deep basin	Buildings	Land	Streets	Water	Total
	Feet	*Feet*	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*
Workshops, store-houses, and offices			5.373	8.440	6.110		19.923
Officers' quarters, (24)			.952	15.831	5.752		22.535
Workmen's quarters, (28)			.578	5.493	2.333		7.826
Parks and squares				19.771	5.264		25.035
Bay road, on southern and western shore, (3.017 miles)					18.231		18.231
Cemetery				6.675	.344		7.009
Total appropriated for yards and docks	263		6.903	56.200	38.034		101.137
Unappropriated							
Reservation A, not including Bay road				21.830	1.910		23.740
Reservation B, not including Bay road				376.585	4.914		381.499
Reservation C				9.935	2.536		12.471
Total unappropriated				408.350	9.360		417.710
Total under yards and docks			6.903	464.550	47.394		518.847
Marine-barracks, reservation, (land, including building-streets, not including Bay road				24.681	2.310		26.991

	Quay-wall, front	Front on deep basin	Buildings	Land	Streets	Water	Total
Yards and Docks—Continued	*Feet*	*Feet*	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*
Light-house reservation, (not including Bay road)	.....	.....	.....	4.890	.....	.....	4.890
Total appropriation for all purposes	11,573	8,547	74.931	223.804	162.110	120.939	563.784
Total high land, unappropriated	.....	.....	.....	408.350	9.360	.....	417.710
Area of large tule, all that part not appropriated, (Reservation D)	.....	.....	.....	.....	.....	.....	3,935
Total island (nearly) as increased by improvements	.....	.....	.....	.....	.....	.....	4,916

RECAPITULATION

	Quay-wall, front	Front on deep basin	Buildings	Land	Streets	Water	Total
	Feet	*Feet*	*Acres*	*Acres*	*Acres*	*Acres*	*Acres*
Construction and Repair	6,580	3,186	32.146	55.335	58.552	76.885	222.918
Steam-Engineering	2,365	5,361	13.592	6.159	21.284	26.054	67.089
Equipment and Recruiting	952½		10.755	8.541	12.453		31.749
Ordnance	887⅔		6.795	35.307	21.236		63.338
Provisions and Clothing	525		4.327	1.481	5.612		11.420
Navigation			.298		.401		.699
Medicine and Surgery			.115	31.210	2.228		33.553
Yards and Docks			6.903	56.200	38.034		101.137
Marine-barracks reservation				24.681	2.310		26.991
Light-house reservation				4.890			4.890
Total appropriation for all purposes	11,573	8,547	74.931	223.804	162.110	102.939	563.784
Total high land, unappropriated				408.350	9.360		417.710
Large tule, unappropriated, (Reservation D)							3.935
Total island (nearly) as increased)							4.916

In arranging the plan of the yard we have adopted as the size of building-blocks, generally, 230 by 400 feet. Some of them are a little larger, and a few are smaller. The width adopted for the streets is 70 feet, except along the front of the railways for repairing or building vessels, where it is 150 feet, and along the deep basin, where it is 100 feet wide.

The subject of road-making is one of great interest and importance, and has received due consideration. In this country where all the rains of the season fall in a few weeks, and the character of the soil is such as to render the roads almost impassable during the rainy season, it becomes an imperative necessity that the utmost care should be exercised in their construction.

In the city of San Francisco the various kinds of wood pavements have been extensively used, but the results have not been favorable, and it is believed that they are now all regarded as failures; the authorities have abandoned the use of them and are resorting to other plans, the most popular of which are the Belgian block, the cobble-stone, and the macadam roads.

Some other plans are being experimented with, and we have made arrangements with parties in San Francisco to lay down some sample pavements for test. These will consist of a roadway 21 feet wide and 60 feet long for each kind, and they will be laid in a part of the yard where they will be subject to the severest tests, and be as equally exposed as possible.

The first sample will be what is known as the Parisen patent, and is similar to a pavement in the city of Washington, near the Arlington House. It will be put down by Mr. Frank M. Brown, the owner of the patent. This pavement is believed to be a good one if properly laid, but is very expensive. Its depth to the road-bed will be ten inches, and the cost $5.10¾ per square yard.

The next sample is that known as the hydro-carbonized brick pavement, and will be put down by the San Francisco Paving Company. This pavement is made of soft brick boiled in a mixture of coal-tar and sulphur; the bed is graded to the depth of 10¾ inches below the proposed surface of the pavement; a depth of 4 inches of wet sand, well rolled, is then laid upon it, common unprepared bricks are then laid flat-wise, in the ordinary herring-bone style, the joints being pretty large; these joints are then filled with hot coal-tar, and upon this lower course of bricks the prepared bricks are laid edge-wise, each being first dipped in hot coal-tar, and the whole well grouted with coal-tar, thus forming a thickness of about six and three-quarter inches of brick laid on four inches of sand. We have seen specimens of this pavement in San Francisco and Sacramento, both of which appear to have stood remarkably well, the first named having been in use about two and the last five years.

That in San Francisco is in a public street where there is a very large amount of travel, and that at Sacramento at a crossing to a coal-yard, where the

entire travel was confined to a certain part of the pavement. The cost of this pavement is less than either of the other two kinds to be tested, being $4.16 per square yard.

The other sample is the called asphalt road, and will be laid down by N. P. Perrine. This pavement is composed of broken lime-stone and asphalt mixed, and applied in a manner similar to that in which the roads in Paris are constructed, and will cost $4.50 per square yard.

These several kinds of pavements will be laid down in the yard at a point where a fair test can be made, but, of course, no opinion can be given of their relative merits until the results of actual use can be obtained.

The great extent of the yard will render an immense amount of paving of some kind necessary, if such roads are to be depended upon for the hauling to be done.

We are of the opinion that, in view of the great cost of paving and the great distances to be traveled over when the yard is completed, rail-tracks will be found the most economical and expeditious for the transportation of heavy materials and stores between distant points, and we have therefore laid down a system of tracks which will afford very easy access to all important points. These tracks should be supplied with cars and trucks of various kinds, and steam-engines for running them.

The western side of the island being exposed to the wash of the waters of the Bay of San Pablo, it

is necessary that some means should be adopted to prevent the encroachment of the water on that side of the island. We therefore recommend that a rip-rap wall be thrown up along the shore, and that a road-way be built entirely around that portion of the island.

There is a large quantity of stone laying along the shore, which will probably be sufficient for this purpose, and it is recommended that this work be commenced with a moderate force as soon as means can be obtained for the purpose.

In connection with the subject of road-building, the question of grades was considered.

The northern portion of the island, upon which the buildings and basins are located, is an undulating plain, a small part of which, comprising the tule-lands, is about five feet below the height of the quay-wall as established by the board, the remainder being dry land from five to twenty feet above the quay-wall, excepting a hillock of small area, which rises to the height of fifty feet. As a consequence of this formation of the ground, the amount of excavation required will be very moderate, and flat grades are practicable.

The excavation for basins is also reduced to a minimum by their location on the low tule-lands. The quay-walls fixed, as before stated, at a uniform height along the whole front of the yard, is the primary plane from which rises the grades of all the principal streets.

The proposed adoption of locomotives upon railways as the medium of traffic, and the possible ulti-

mate use of traction-engines for the same purpose, rendered the adoption of easy grades necessary. Such grades are also best suited to the floor-lines of buildings located along the streets, the board therefore determined to fix the maximum grade at one foot rise in one hundred feet. A few exceptions to this rule were made in streets not adjacent to workshops, by an increase of the maximum to 2.15 feet per hundred, in order to adapt the grades to structures already erected.

These maximum grades are all at right angles with the quay-wall, and with the line of greatest traffic. Streets parallel with the quay-wall and the longitudinal axis of the buildings, and in the line of greatest traffic, have much lighter grades, no cases in the vicinity of the workshops exceeding five-tenths of a foot per hundred feet. Streets over which heavy boilers and engines will usually be moved have no grades above five-tenths, and the streets leading from the quay-wall and the ordnance-foundry to the gun-park have the same easy grades.

In connection with the grades of the streets was considered the subject of the proper grades for the building and repairing ways and the storage-ways for vessels. The adjustment of all the elements entering into this question led the board to adopt as most suitable a grade of .75 foot per hundred. The grades and elevations above quay-wall coping are marked on the plan at the intersections of the different streets, and will readily be understood.

A long line of quay-wall having been projected, the attention of the board was directed to a careful consideration of the different modes of building such structures, and the adoption of such methods and material as would prove most economical, expeditious, and beneficial. The comparison was confined to two kinds of material, concrete and granite, the wall in either case to rest upon a properly prepared pile foundation.

In the English dock-yards, and in many other places where large heavy quay-walls are being built, concrete has almost invariably been adopted as the best material to be used, both on account of cheapness of first cost and also on account of its supposed superior durability. It is manufactured in large masses of any desired size and form, easily deposited upon properly prepared foundations, and arranged by workmen in bells or diving-armor, in the same manner as has been practiced in this country in constructing walls of granite for similar purposes. Careful estimates have been made in minute details of the cost of preparing these masses of concrete and placing them in position; liberal allowances were made for the cost of all material, and labor, and the entire use of Portland cement is contemplated.

The cost per linear foot of a concrete wall of suitable section, including the pile foundation and granite coping, is $278.98, while the estimated cost of a granite wall of the same section, including the same foundation, is $799.77 per linear foot, the cost of the granite being 286 per cent. greater than the

cost of concrete. The materials for making this concrete are abundant and cheap in this vicinity except the cement, which would be imported from England. The labor required in its manufacture would be of the cheapest kind; indeed, on a large scale, the introduction of labor-saving machinery would greatly reduce the cost, the only skilled labor needed being in placing the blocks in the wall.

We have no hesitation in recommending the adoption of this method of construction in building the long line of quay-wall which we have projected.

The water-supply of the island has also received our careful attention. The most important element involved in this question is the source of supply. The topographical and climatic conditions of the island are such as to preclude the possibility of any perennial resource, such as is ordinarily available when artificial works for the supply of water are undertaken. There are no streams nor adequate springs. The numerous wells that have been sunk from time to time, even to considerable depths, have yielded only a scanty supply of inferior drinking-water, while, in the case of an early experiment on the premises, in boring an artesian well, the attempt was abandoned at the depth of 218 feet on account of finding no water except such as was found near the surface. Up to the present time the water-supply of the island, especially for house and ship purposes, has been rain-water collected on the building-roofs and stored in expensive masonry-cisterns, the capacity of which at the present time

is about 1,390,000 gallons, exclusive of those of the marine barracks, hospital, and magazine; while for building purposes, steam-boilers, and the supply of cattle, the main dependence has been upon the yard-wells, from which generally the water has necessarily been obliged to be hauled, at no small expense, to the point of use. Under these circumstances, the decision of what may prove a reliable source of supply involved the most careful consideration, and in order to be able to present the most suitable selection, with a proper plan of works in connection therewith, the board have felt themselves called upon to make as thorough investigation of all the conditions of the locality as possible.

Having in view the fact that the adjoining town of Vallejo, as well as Oakland and the large city of San Francisco, are supplied from artificial reservoirs, filled chiefly by the rain-fall of their respective districts, the board was satisfied that the yard must be supplied by similar means. It was, however, aware of the experiment of the artesian well now being carried on at the Government arsenal at Benecia, the final success of which, if established within the time hoped for by the authorities of that establishment, may undoubtedly influence the recommendations which it, in the mean time, feels compelled to make under the great urgency of the wants of the yard, which require operations to be immediately undertaken.

The works at Vallejo, and those at the Spring Valley Water Company, by the latter of which San

Francisco is now supplied, were visited and examined, establishing in the mind of the board the conviction of the entire adequacy of the rain-fall storage system, where the conditions admit of its application, especially in a country like this, where none but the largest river-courses supply water throughout the season, all other streams remaining dry for at least half of the year. The application of this system to the yard was obvious, although it remained a question whether the locality itself furnished the required elements for its realization to the extent demanded. It was apparent, in case this should be answered in the negative, that we could with more certainty look to the adjacent territory, Vallejo and its connections, for the required supply, as the Vallejo Water Company has already established its feasibility.

It is obvious that the storage of any required amount of water on the system mentioned will depend on the two elements of available territory for a catchment area and the amount of rain-fall taken in connection with its mode of occurrence, the reservoir for storage being placed in a proper relation to the catchment area and to the locality where the water is to be finally used. So far as the territory of Mare Island is concerned, there can be no doubt, providing the requisite amount of rain-fall could be annually depended upon, that an abundant catchment area at a high elevation may be obtained, the only contingency in the matter being the rain-fall, which in some years is known to fail. At an eleva-

tion above the quay-wall coping of 110 feet, and above this to the highest point of the island, there are one hundred and forty-seven acres which can be drained into a reservoir, which may be so located as to command a head of about 100 feet above the said coping.

With a saving of twelve inches of rain-fall, and with reservoirs of sufficient capacity, there would annually be stored an amount of 48,000,000 gallons, amply sufficient for all the present wants of the yard, and probably for many years to come. This statement is made, however, not as a condition of things to be entirely depended upon for the yard-supply, but as an illustration of the general system by which this supply will be likely to be effected, and so far as the Island territory and the joint occurrence of its rain-fall are concerned, the feasibility of its being made to act a greater or lesser part in connection with other sources outside of it, which may be chosen for a supply.

The board has been informed of several sources of water-supply outside of the island by various parties representing proprietorship, who severally have addressed letters on the subject. One of these, and the largest probably in the State of California, is Clear Lake, which lies about sixty miles north of the yard. A company has been organized for several years, whose object is to construct suitable works for the utilization of this lake, operations having already been commenced, although not upon the line intended eventually to pass through the vicinity of Vallejo.

The accompanying letter, marked "A," received from the president of the Clear Lake Water Company, states the essential objects of this company, and gives a description of their water-source.

The accompanying letter, marked "B," received from Messrs. Burrage & Tucker, states the existence of another source of water-supply near the town of Yountville, situated in Napa Valley, and to the north of the yard, the point being about twenty-four miles distant.

The Vallejo source is quite a large artificial reservoir or pond, located about three and a half miles from the town. It is formed by an earthdam built across a narrow opening between high hills, its present area being estimated at about one hundred and sixty acres. The catchment area surrounding the reservoir is computed at over seven thousand acres, being in great part of a mountainous character, which quickly pours off the rain-fall into the pond. The elevation of the outlet of the discharge-pipe at the dam is about 32½ feet above the coping of the yard quay-wall, the entire head above this point being the elevation of the water-surface over the outlet, which ordinarily may be assumed at 35 feet, thus making the entire head over the quay-wall 67½ feet.

From the experience of the few years elapsed since the completion of this reservoir, taking into account its large dimensions, the quantity of water which has annually been stored, and the quantity distributed to the population of Vallejo, there seems

no reason to doubt its capacity to furnish all the demands of the navy-yard, should it be decided to adopt this method of supply.

In the cases of the two former sources, it is evident that no reliance for an immediate supply for the yard can be assured.

The development of the extensive works proposed by the Clear Lake Water Company may require some years before they will reach this vicinity.

The proposition of the proprietors of the Yountville source does not, in the estimation of the board, commend itself for adoption by the Government, although there can be no doubt that its sole possession of an adequate water-source, within a reasonable distance, in which economical works might be established, would be attended with very great advantages.

The conclusion of the board in reference to this water-supply question is, to recommend the adoption of the proposition of the Vallejo Water Company, as given in the accompanying letter of its president, of the 7th instant, marked "C," addressed to the commandant of the yard, and by him referred to the board. The price demanded for the amount of supply seems reasonable compared with the rates understood to be now paid by the water consumers of San Francisco to the Spring Valley Water Company, the price being about the same for a similar large quantity taken at once by our establishment.

In this recommendation it seems necessary to state the outline of the works required in connec-

tion with the delivery of the water at Vallejo at the point indicated by the company. It will be necessary, first, to connect with the company's pipe and lay across the strait a submerged pipe of, say. 5 inches interior diameter, leading to a proper fore-bay on the yard, placed at a sufficient elevation to obtain as much distributing head as the power of the company's reservoir and works will bestow; we can, probably, thus depend upon a head of about 60 feet above the coping of the quay-wall, as due to the pressure of the company's reservoir.

The fore-bay ought to be of sufficient capacity to hold a considerable quantity of water, at least 100,000 gallons, and be connected with the main distributing reservoir, which is to be placed at a sufficient elevation to give a high pressure over every building of the yard by means of a suitable pumping-apparatus, pipe, &c., by which this service-reservoir may be filled. The location of the fore-bay and reservoir is recommended to be on the hill to the westward of the hospital, as marked on the plan.

By this arrangement it will be seen that the system of pipes conveying the water to the fore-bay, and the connection of a discharge-pipe from the distributing reservoir to this system with proper branch pipes, valves, &c., will also form the distributing system for the yard-service.

The proposition of the Vallejo Water Company is recommended as the only one which, in the opinion of the board, is immediately feasible. An agree-

ment on the proposed terms, or lower if they can be had, may be entered upon for a certain number of years, while in the mean time the development in the general enterprise of water-works in the vicinity by other parties, with those that may follow on the island itself, through the undertaking of the storage of its own rain-fall, will probably lead to other more economical arrangements.

Reference has already been made to the feasibility of this last-mentioned plan, with the belief that it ought soon to be undertaken; although the annual rain-fall may not be regularly sufficient for the storage of a full supply of water, there may often happen seasons of abundance, when a considerable quantity can readily be stored.

We have caused such examinations to be made on the island as show a large catchment area, and a convenient site for a storage reservoir. The latter, when filled, as it often may be, will furnish a sufficiency for a very important supply for irrigation and other purposes.

Approximate estimates for the works required in connection with the supply from the Vallejo Water Company are as follows:

Pipe across Napa Straits	$ 7,000
Forebay and pumping apparatus	8,000
Distributing reservoir, main and service pipes	60,000
Pumping-house, hydrants, valves, &c.	4,000
Total	$79,000

It is to be observed that all these works will be available for any other source of supply than that of Vallejo, except that the pipe across the straits might require some different location.

Appropriate estimates for reservoir, &c., for storing the rain-fall on the island, are—

Storage reservoir	$15,000
Pipes, &c., to connect with distributing reservoir	5,000
Contingencies	2,000
Total	$22,000

The instructions of the board require its consideration of the cost and feasibility of an artesian well. They would state that, pending the operations at the United States arsenal at Benicia, before referred to in this report, and in view of a like experiment tried on this island several years ago, it considered this plan still problematical. Of its feasibility there can be no means of deciding in advance of actual success, proved in some near quarter where the geological conditions are like those of the island, such as is now hoped for at Benicia.

The subject of lighting the yard has received due consideration by the study of the present mode of effecting this purpose in comparison with other means with which we are acquainted. The present method is founded on the use of gasoline employed in conjunction with atmospheric air, the operation being effected by a very simple apparatus which

produces the required mixture of illuminating-gas, and forces the same into the large holder, from which by the necessary pipes it is carried to the points of consumption.

It is obvious from the nature of the principle involved in the manipulation of this gas, and providing the gasoline is of a proper gravity, that it may be made of high illuminating power, as is proven by photometrical tests. That it is economical, as compared with the present charges for gas in the cities and towns of this vicinity, is shown by the expenditure of material and labor employed from May 1 to September 30 of the past year, in its manufacture, during which the price of the gasoline has been reduced 20 per cent. from its former cost. During this time, we find the cost of manufacture to be $2.65, currency, per thousand cubic feet, charging in the account the whole wages of the gas-maker, who not only superintended the making of gas, but the repairs and maintenance of all the works.

The simplicity of this method of gas-lighting, in our opinion, commends itself for limited and compact communities. It is employed in several small towns on this coast, and has, we learn, given good satisfaction, for it has been continued several years at these places. There are reasons, however, for not recommending it as a permanent resource for this yard, especially when its works shall have become more numerous and spread over a greater extent. The enlargement of the plan will involve the handling of greater quantities of gasoline, which

thus proportionally may be considered to increase its danger, though on the present small scale of use and very careful handling, there is but little apprehension. It is an article of importation to this market, and by a few hands, to whom a time of scarcity or combination is a temptation to raise the price, while on the other hand the loss by its rapid evaporation, and its danger from careless exposure to fire, renders the storage of a large quantity inadmissible, when we might otherwise wish to avail ourselves of a low market to purchase it.

The present location of the gas-works and holder in our recommendation of the buildings of the yard is appropriated to the pumping-engine house for the new stone dry-dock. This location is between the wings of the present smithery, No. 69, and in our opinion is the most suitable point for such an object. This arrangement will necessitate the substitution of another site for the gas-works, which in our plan we recommend to be on one of the blocks, No. 51, assigned to the department of yards and docks.

The demand for the construction of the dock pumping-works of course will require the removal of the present gas-works and the commencement of the new establishment, and it is recommended that the operations therefor be soon undertaken. The new gas-works we recommend to be on the coal system of manufacture, with a capacity for making 40,000 feet per diem, which will be ample for many years to come for all the establishments of the

island. For the purpose of commencing the improvements proposed by the board, appropriations will be required for the objects mentioned in the following schedule of works; operations upon the objects to be commenced in the order in which they are named, and the whole to be finished within fifteen years, at the cost approximately stated opposite each object.

Schedule of works to be first built.

1. For grading 100,000 cubic yards per annum for ten years	$ 500,000
2. The quay-wall, 500 linear feet per annum, commencing at the south side of block No. 9 and running thence southerly to north side of block No. 29, afterward to be extended northerly to north line of block No. 2	2,500,000
3. For extension of floating-dock basin, and building and repairing ways, 675 feet, to include ways No. 8, and iron floating-dock, to be commenced as soon as the quay-wall, opposite, shall have been constructed	1,750,000
4. For wood and metal workshops for yards and docks, south and east side of square No. 34, 675 feet long	500,000
5. For carpenter and joiner shops for construction and repair, on square No. 11, 400 feet long	300,000

6. For machine-shop, store-house, and offices for construction and repair, all of square No. 39, 1,060 feet in length 700,000
7. For store-house and office for yards and docks, south side of square No. 35, 340 feet long 250,000
8. For temporary erecting-shop for steam-engineering, to be ultimately used for ordnance gun-carriage shops, north side of block No. 3, 400 feet 300,000
9. For sail-loft and store east side of block No. 5, 400 feet 300,000
10. For general store for ordnance, east side of block No. 18, 317 feet 250,000
11. For shell-house for ordnance, east side of block No. 17, 360 feet 250,000

The south half of block No. 8 to be temporarily occupied by equipment and recruiting for stores of returned vessels. For the permanent use of the Bureau of Steam Engineering.

12. For smithery, the east side of square No. 26, 400 feet long 200,000
13. For machine-shop, the east, south, and north sides of square No. 27, 600 feet in length 500,000

14. For boiler-shop, the west side of square No. 27, (for temporary use, to be eventually used as an erecting-shop,) 400 feet long	250,000
15. For store-house, the east side of block No. 46, 400 feet long	300,000
16. Foundery, east side of square No. 28, 400 feet long	250,000
17. For construction-basin complete	1,500,000
Total for fifteen years' construction	$10,600,000

We have the honor to be, with great respect, your obedient servants,

W. P. S. SANGER,
Civil Engineer, United States Navy.
CALVIN BROWN,
Civil Engineer, United States Navy.
FRANKLIN A. STRATTON,
Civil Engineer, United States Navy.

Commodore C. R. P. Rodgers, U. S. N.,
Chief of Bureau Yards and Docks,
Navy Department,
Washington, D. C.

A.

Office of the Clear Lake Water-Works,
3 and 5 Front Street,
San Francisco, November 3, 1873.

[P. O. Box 1443.]

Dear Sir: In view of the well-authenticated fact that the United States navy-yard at Mare Island

should have an increased supply of pure fresh water at an early day, to meet the requirements of the Government at that most important station, we would respectfully inform you that the Clear Lake Water-Works, (a corporation duly organized under the laws of the State of California, and having its principal place of business at San Francisco,) is expecting within a reasonable period to afford abundant facilities for the supply of water to the navy-yard, Vallejo, Benicia, and other points on and near the line of its proposed canals, with their adjuncts, for bringing the waters of Clear Lake to the city of San Francisco.

Our source of supply, Clear Lake, is one of the largest water-sources in the State of California. It has an area of about eighty square miles; its average depth is about forty-five feet; it stands at an elevation above the sea of about 1,500 feet, and it is fed by several large streams draining a mountainous surface of about four hundred square miles.

The company is now actively engaged in the work of construction, though not on the main line to San Francisco, which will pass near Mare Island. The water will be brought at an ample height to cover all the buildings at the navy-yard. Its quality has been thoroughly tested by assays made by Professor Rising, of the University of California, Professor Falkenan, State assayer of California, and Professor Price, of this city; and it is pronounced by them to be exceedingly well adapted to domestic and industrial purposes.

The Clear Lake Water-Works fully expect to be in a position in a comparatively short time to enter into a contract on the most favorable terms to supply the navy-yard with all the water it can require under any circumstances. It has, therefore, seemed to the board of trustees that you should be made acquainted with these facts at this time, in order that any arrangements for the supply of water now needed may be of such a temporary nature as not to prevent the Government from availing itself hereafter of the facilities which only this company can furnish.

Very respectfully, yours,

JOHN BENSLEY,
President Clear Lake Water-Works.
SAMUEL J. C. SWEZEY,
Secretary.

Capt. W. P. S. SANGER,
President of the Board of Civil Engineers
convened at Navy-Yard, Mare Island.

B.

Yountville, October 30, 1873.

Sir: Understanding that a supply of pure fresh water is needed at the Navy-Yard, we wish to call your attention to a supply in our possession which we feel sure will amply fill all your requirements in that respect.

The stream is situated about eleven miles from Napa City, across the valley on the east side from

Yountville. It is a never-failing stream of pure spring water. We own two hundred acres of land through which this stream passes, probably, over one mile in length on this land. It is estimated there is at least 150 feet fall in this same distance.

There are ample facilities for making dams and constructing reservoirs on the stream that will alone hold four times the amount of water you now require.

We will sell these two hundred acres of land with all our rights to the stream, excepting we retain the right and privilege under all circumstances of building and maintaining a dam across the stream, if none is built by the purchaser near, at a point high enough to convey the water to our present building, with at least ten feet ahead at the point of starting; also the right to enter upon said land at any and all times for the purpose of laying or repairing an end-pipe to connect with the water in said dam, and the full control of all the water that will run in said pipe. With these reservations secured to us we will convey all our right and title to the balance for $10,000. It would give us much pleasure to show you the property before the rains commence. Whatever conclusions you may arrive at please to inform us as soon as convenient afterwards.

Yours truly,

BURRAGE & TUCKER.

Capt. W. P. S. Sanger,
President of the Board of Civil Engineers
convened at Navy-Yard, Mare Island.

C.

Vallejo, November 7, 1873.

Proposal of the Vallejo Water Company to supply water to the Mare Island Navy-Yard:

The Vallejo City Water Company will furnish pure fresh water to the extent of 33,000 gallons per day, or 1,000,000 gallons per month, delivered from the pipe of the company at the foot of Georgia street, in the city of Vallejo, for the sum of $5,000 in United States gold coin per annum, payable in twelve equal monthly payments of $416.67 each. The Government to furnish its own pipe or mode of conveying said water to Mare Island.

[Seal] A. CHOBOT,

President of the Vallejo Water Company.

PAUL R. HUBBS,

Secretary.

Rear-Admiral John Rodgers, U. S. N.,

Commanding Mare Island Navy-Yard.

Respectfully referred to the board of civil engineers.

JOHN RODGERS,

Commandant.

We offer in evidence a map from Volume 6, Page 5 of Bancroft's History of California, showing the grants and their location and what was covered by those grants.

(The document was received in evidence, marked "Plaintiff's Exhibit N".)

SAN PABLO BAY

STATION 2

STATION 6+20

STATION 10+40

STATION 13

STATION 19

STATION 21+50

STATION 24

STATION 34

Mean High Tide

+5.8

M.L.L.T.

LEVEE

SAND RIDGE

Pond

Slough

1852

1906

1917

1931

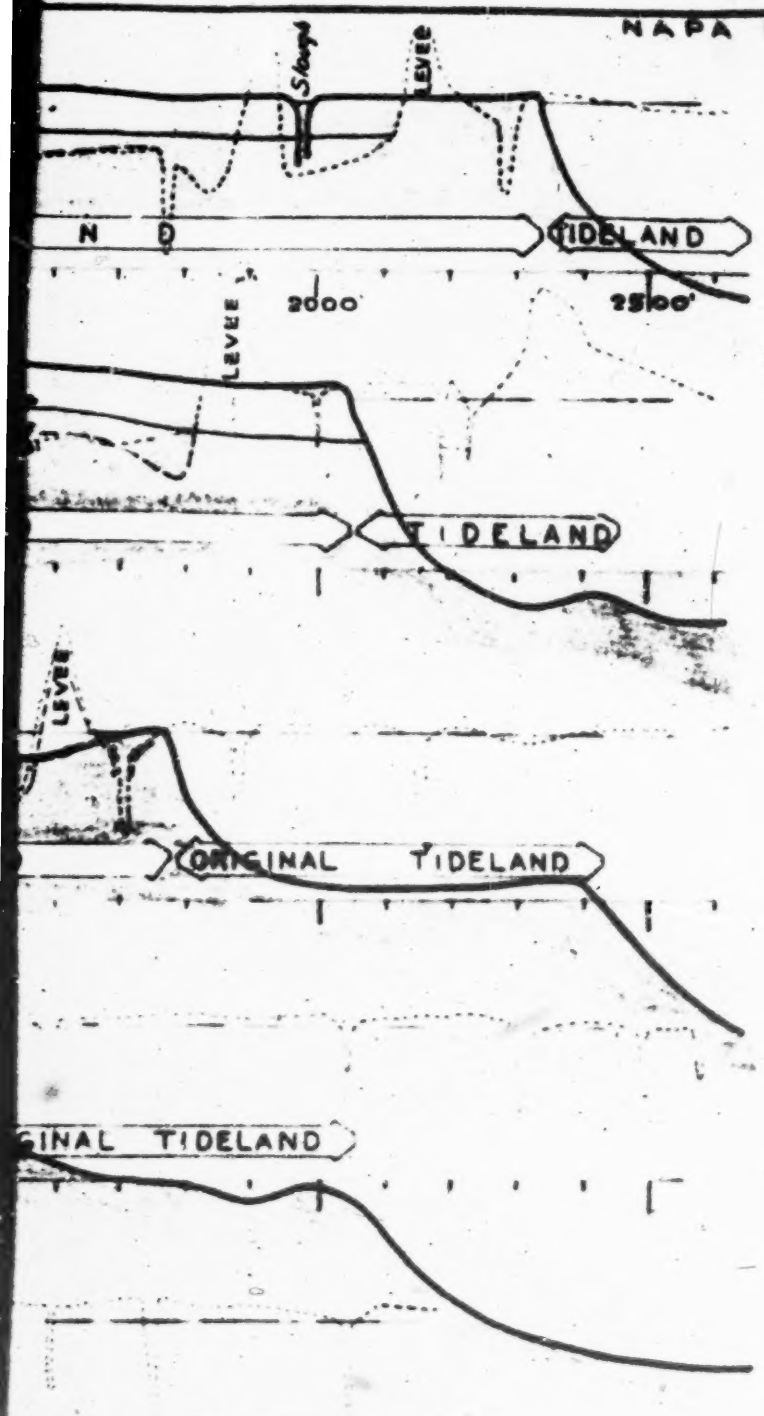
ORIGINAL TIDELAND

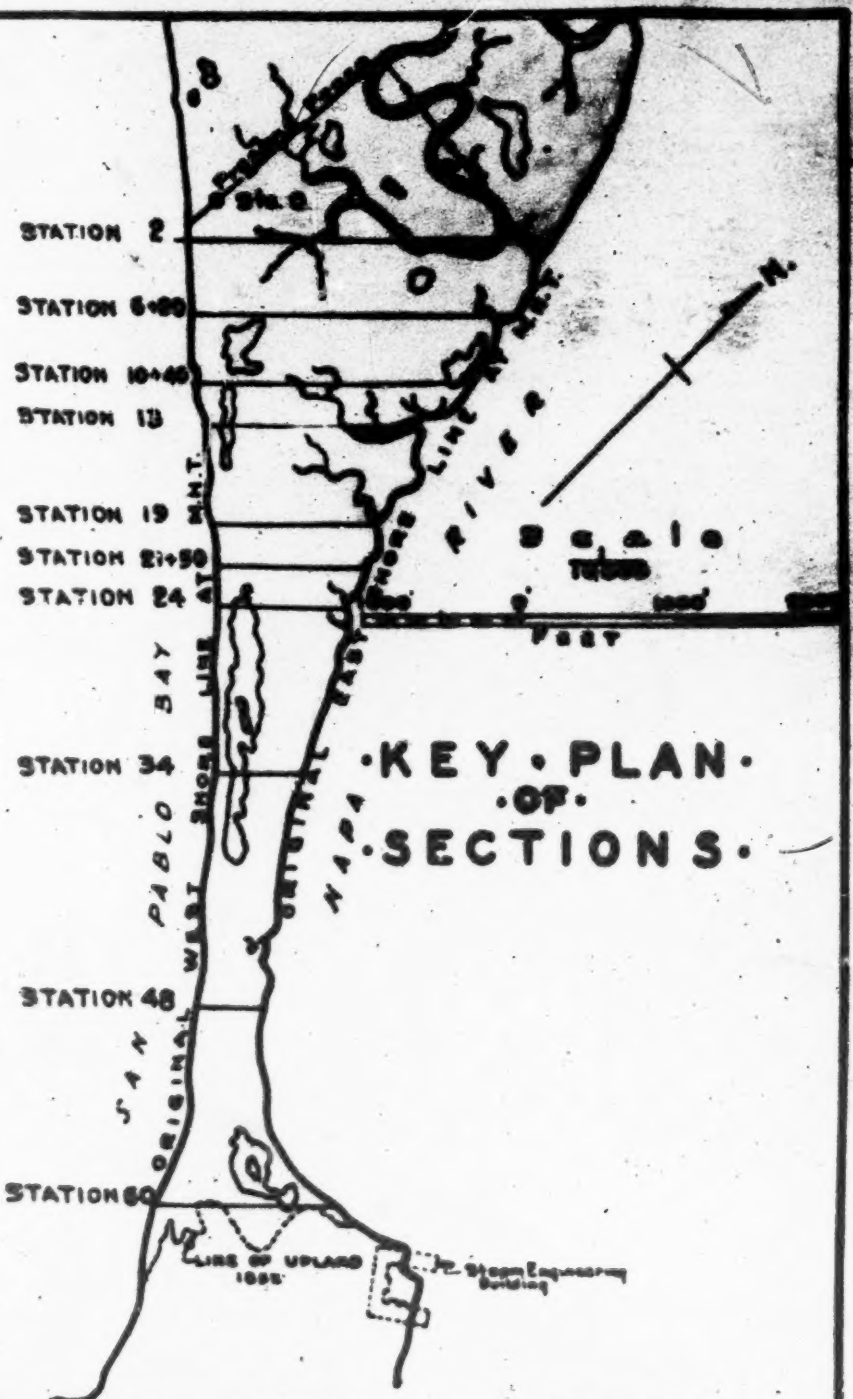
ORIGINAL LOWLAND

1500

1000

500





EXPLANATORY NOTES

1931 CROSS-SECTIONS – From a recent survey showing present elevation of land. Note sunken condition of the area between levees as compared to the normal height of accretions on the east and west sides.

Traces still remain of the original sand ridge or barrier on the San Pablo Bay side. The irregular profile of station 2 shows the disturbed condition of the surface due to recent excavation of sand at that point.

Area south of station 24 has been used for deposit of spoil from channel dredging. A cross-section at station 48 is representative for all of the sections in this area. Note that fill covers largely original tide lands.

1917 CROSS-SECTIONS – From a former survey as shown on P.W. Map R-304 (C-304) of June 1917. Plotted within the limits of the original shore lines of 1852. Area between levees lies at a higher elevation than in 1931. Trace of sand ridge is longer and more prominent than in 1931.

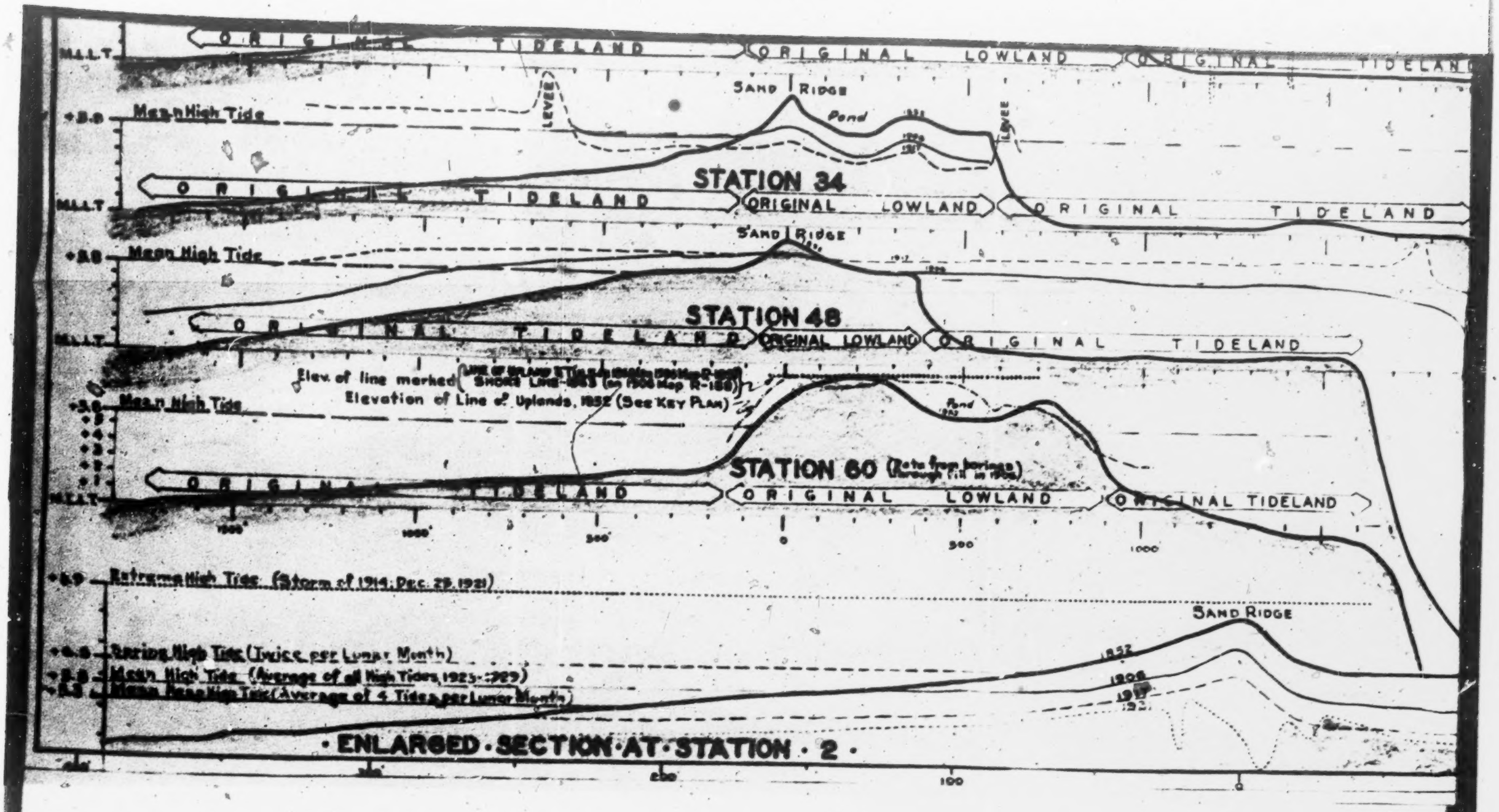
Station 48 shows an abnormal elevation due to artificial fill.

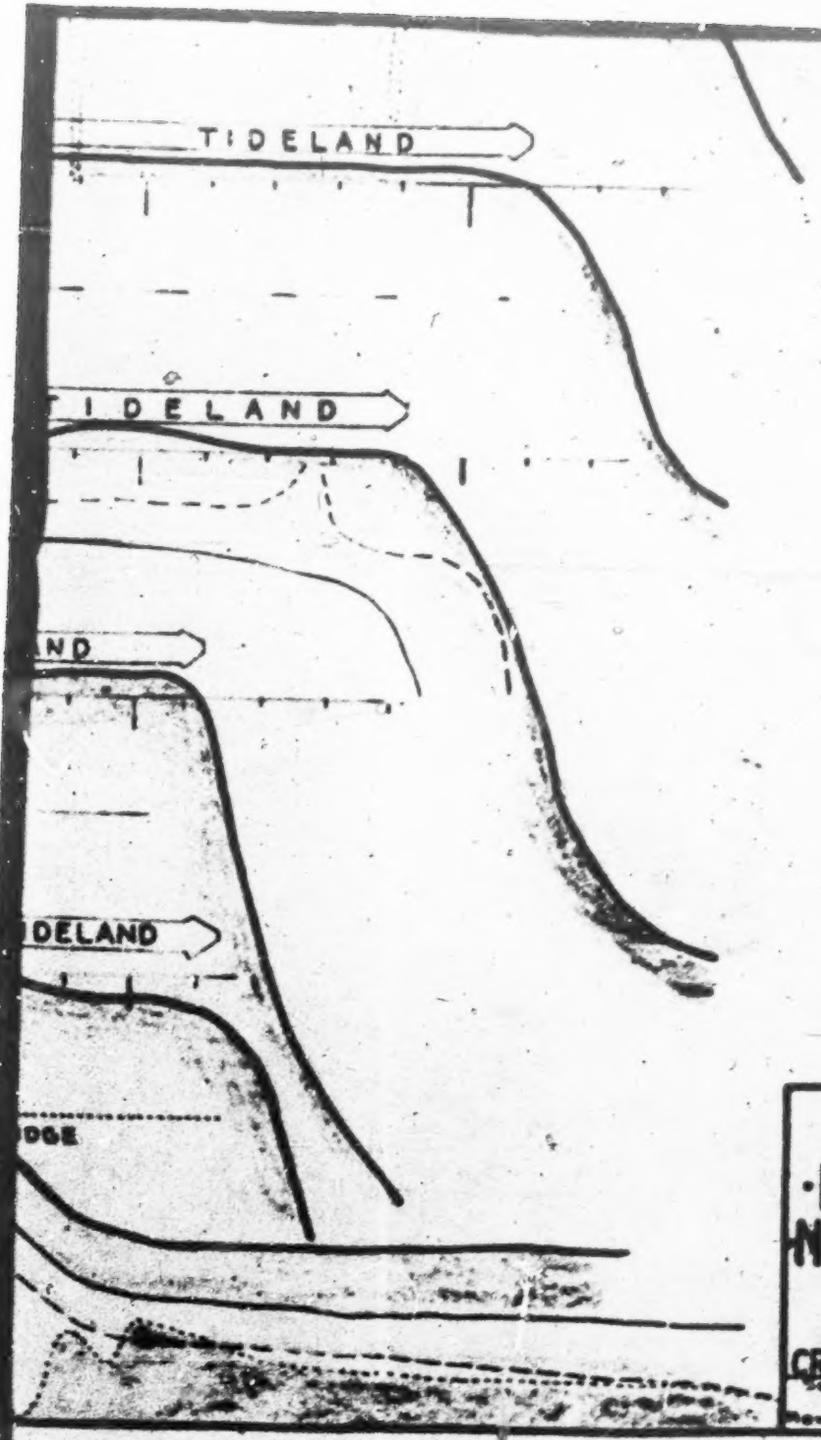
1906 CROSS-SECTIONS – From a former survey as shown on P.W. Map R-188 (C-188) of Feb. 1906. Plotted within the limits of the original shore lines of 1852. The area between the levees is found to have been higher in 1906 than in either 1917 or 1931.

1852 CROSS-SECTIONS – These have been plotted as follows:

(a) The shore lines and elevations between high and low water lines have been plotted from Alden's 1852 U.S.C. & G.S. Chart and from the replotting of the original notes (Exhibits L-20 and L-21)

(b) The locations of sloughs, ponds and drainage


ORIGINAL TIDELAND
ORIGINAL LOWLAND
ORIGINAL TIDELAND
M.L.L.T.
+8.0 Mean High Tide
LEVEE
SAND RIDGE
Pond
LEVEE
STATION 34
ORIGINAL TIDELAND
ORIGINAL LOWLAND
ORIGINAL TIDELAND
M.L.L.T.
SAND RIDGE
+8.8 Mean High Tide
STATION 48
ORIGINAL TIDELAND
ORIGINAL LOWLAND
ORIGINAL TIDELAND
M.L.L.T.
Elev. of line marked
Elevation of Line of Uplands, 1852 (See KEY PLAN)
+8.6 Mean High Tide
Pond
STATION 60 (Data from borings)
ORIGINAL TIDELAND
ORIGINAL LOWLAND
ORIGINAL TIDELAND
M.L.L.T.
1000
500
0
500
1000
+8.9 Extreme High Tide (Storm of 1914, Dec. 29, 1921)
SAND RIDGE
+6.6 Spring High Tide (Twice per Lunar Month)
+5.8 Mean High Tide (Average of all High Tides, 1925-1929)
+5.3 Mean Neap High Tide (Average of 4 Tides per Lunar Month)
1852
1906
1917
1921
· ENLARGED · SECTION · AT · STATION · 2 ·
200
100
0



Station 48 shows an abnormal elevation due to artificial fill.

1906 CROSS-SECTIONS – From a former survey as shown on P.W. Map R. 188 (C-188) of Feb. 1906. Plotted within the limits of the original shore lines of 1852. The area between the levees is found to have been higher in 1906 than in either 1917 or 1931.

1852 CROSS-SECTIONS – These have been plotted as follows:

(a) The shore lines and elevations between high and low water lines have been plotted from Alden's 1856 U.S.C. & G.S. Chart and from the replotting of the original notes (Exhibits L-20 and L-21).

(b) The locations of sloughs, ponds and drainage features are taken from the 1851-8 surveys of U.S.C.&G.S. The 1906 cross-sections, although lower in elevation, were found to retain corresponding locations of sloughs, ponds and drainage features.

Therefore, the 1852 profile has been drawn parallel to the 1906 profile.

(c) It will be noted on every section that the unreclaimed low and tule land outside the levees builds up to an elevation at least (1/4) of a foot on the west or the San Pablo side and .67 of a foot above mean high waters on the Napa River or east side. The latter elevation of .67 of a foot was also noted by the Sloat Board of 1852 with respect to the tule land east of the highlands. The area east of the sand ridge or barrier has been averaged in the 1852 cross-sections at an elevation of .67 of a foot above mean or ordinary high water and represents the lowest possible elevation of the low and tule land east of the barrier or ridge.

(d) A minimum elevation for the crest of the sand ridge has been derived from the least disturbed cross-section shown on the earliest contour survey (Feb. 1906; defendants exhibit No. 4). The use of this elevation on all cross-sections restores the original relation of the sand ridge to the shore line at mean high water.

RE-STATION 60:

Cross Section thru neck of land in 1852
Elevation of "LINE OF UPLANDS 1852"
Elevation of "SHORE LINE 1852"
DATA FROM [illegible] MADE IN [illegible]

RE-ENLARGED SECTION AT STATION 2:

1. Portion including sand ridge redrawn to a larger scale to make clearer the relation of various Tidal Levels (and frequency) to the crest.
2. Irregularity at sand ridge in 1931 due to recent sand excavation.

PLATE IV

·PHYSICAL·CHANGES·IN·THE·LOWLANDS NORTH·OF·THE·UPLANDS·OF·MARE·ISLAND· ·FROM·1852·TO·1931·

CROSS·SECTIONS·TAKEN·FROM·ACTUAL·SURVEYS·IN·1852·1906·1917·1931

Surveyed and Plotted [illegible]
Navy Yard, Mare Island, Calif.
August 1931

Under Direction of: [illegible]
[illegible]

We offer in evidence the corrected report of Spanish and American Grants in California, complete to February 25, 1886, prepared by the Surveyor General, published as a supplement to his official report of 1883-84.

(The document was received in evidence and marked "Plaintiff's Exhibit O".)

PLAINTIFF'S EXHIBIT O.

[Endorsed]: Filed Aug. 11, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

Corrected Report
of
SPANISH AND MEXICAN GRANTS
IN CALIFORNIA,
Complete to February 25, 1886.
Prepared by
State Surveyor-General,
Published as Supplement to Official Report
of 1883-84.
[Seal]
Sacramento:
State Office, James J. Ayers, Supt. State Printing.
1886.

5
3
1

No. on Gen'l L. C. Map	NAME OF GRANT	Confirmee	
58	Guenoc	Ritchie & Forbes	2
66	Guilicos, Los	Juan Wilson	1
519	Guajome	A. Solma et al.	
462	Habra, La	Andres Pico et al.	
19	Honcut	Chas. Covillaud et al.	3
340	Huasna	I. J. Sparks	2
182	Huecos, Los	Roland & Hornsby	3
315	Huer-h-uero	F. Branch	1
421	Huerta de Cuati	V. Reid	
330	Huerta de Romualdo or El Chorro	Juan Wilson	
72	Huichica	J. P. Leese	1
404	Island of Santa Cruz	Andres Castillero	5
527	Island of San Diego	Peachy & Aspinwall	
470	Island of Santa Catalina	J. M. Covarrubias	4
405	Island of Santa Rosa	M. C. de Jones et al.	6
11	Jacinto	Wm. M. McKee	3
531	Jamacha	A. Lorenzana	
541	Jamul	Heirs of H. S. Burton	
356	Jesus Maria	L. P. Burton et al.	4
22	Jimeno	Larkin & Missroon	4
21	Johnson Rancho	Wm. Johnson	2
80	Jota, La	Geo. C. Yount	
113	Juntas, Las	Heirs of Wm. Welch	13
241	Juristac	J. L. Sargent et al.	
483	Jurupa, part of	A. Stearns	3
482	Jurupa, part of	L. Rubideau	
69	Lac	J. P. Leese	
360	Laguna, La	O. Gutierrez	4
495	Laguna, La	A. Stearns	1
332	Laguna	Bishop J. S. Alemany	
217	Laguna de las Calabazas	F. Hernandez et al.	
163	Laguna de la Merced	J. de Haro et al.	
123	Laguna de los Palos Colorados	J. Moraga et al.	1
30	Laguna de San Antonio	B. Bojorquez	2
301	Laguna de Tache	M. Castro	4
276	Laguna Seca	C. M. de Munras	
196	Laguna Seca	L. C. Bull et al.	1
16	Larkin's Children's Ranch	F. Larkin et al.	4
289	Laureles, Los	J. M. & J. de M. Boronda	6
285	Laureles, Los	L. Ransom	
327	Liebre, La	J. M. Flores	4
266	Llano de Buena Vista	D. Spence	
12	Llano Seco	C. J. Brenham et al.	1
64	Llano de Santa Rosa	J. Carrillo	1
230	Llano del Tequesquite	V. Sanchez et al.	1
81	Locoallomi	Heirs of Julian Pope, dec'd	

SPANISH OR MEXICAN AUTHORITIES—Continued.

rea	Condition of Title	Where Located
220.03	Patented May 22, 1865	Lake
833.86	Patented June 16, 1866	Sonoma
219.41	Patented September 7, 1871	San Diego
698.57	Patented December 4, 1872	Los Angeles
079.96	Patented March 9, 1863	Yuba
152.99	Patented January 23, 1879	San Luis Obispo
950.92	Patented May 13, 1876	Santa Clara
684.95	Patented August 9, 1866	San Luis Obispo
128.26	Patented June 30, 1859	Los Angeles
117.13	Patented April 13, 1871	San Luis Obispo
704.04	Patented August 3, 1859	Sonoma and Napa
760.33	Patented March 21, 1867	Santa Barbara
185.46	Patented June 11, 1869	San Diego
820.43	Patented April 10, 1867	Los Angeles
696.49	Patented October 3, 1871	Santa Barbara
487.52	Patented September 19, 1859	Colusa
881.16	Patented April 11, 1871	San Diego
926.22	Patented October 26, 1876	San Diego
184.93	Patented September 7, 1871	Santa Barbara
854.26	Patented July 18, 1862	Colusa and Yolo
197.31	Patented August 3, 1857	Yuba
453.84	Patented December 18, 1857	Napa
292.82	Patented July 22, 1870	Contra Costa
540.44	Patented November 13, 1871	Santa Clara
819.11	Patented May 23, 1879	San Bernardino
749.99	Patented December 8, 1876	San Bernardino
176.58	Patented August 6, 1872	Sonoma
703.91	Patented May 17, 1867	Santa Barbara
338.84	Patented September 3, 1872	San Diego
157.02	Patented February 4, 1859	San Luis Obispo
304.75	Patented December 8, 1868	Santa Cruz
219.33	Patented September 10, 1872	San Francisco and San Mateo
316.25	Patented August 10, 1878	Contra Costa
903.42	Patented November 21, 1871	Marin and Sonoma
300.62	Patented March 6, 1866	Fresno
179.50	Patented November 24, 1865	Monterey
972.92	Patented November 24, 1865	Santa Clara
164.22	Patented December 18, 1857	Colusa
24.99	Patented August 9, 1866	Monterey
718.23	Patented April 18, 1871	Monterey
799.59	Patented June 21, 1875	Kern and Los Angeles
146.23	Patented January 4, 1860	Monterey
167.17	Patented June 18, 1860	Butte
116.03	Patented November 27, 1865	Sonoma
016.30	Patented December 29, 1871	San Benito
772.79	Patented March 17, 1862	Napa

[illegible]	Lomerias Muertas	V. Sanchez et al.	[illegible]	Patented August 9, 1866	San Benito
374	Lompoc	J. & J. A. Carrillo	42,085.44	Patented November 3, 1873	Santa Barbara
427	Los Angeles City Lands	City of Los Angeles	17,172.37	Pat'd Aug. 4, '75 and Aug. 9, '66	Los Angeles
.....	Los Angeles County, lot near San Pedro in	Temple & Alexander	1,771.77	Before Surveyor-General	Los Angeles
60	Mallacomes or Moristal	Cook & Ingalls	2,559.94	Patented February 18, 1859	Sonoma
61	Mallacomes or Moristal y Plan de Agua Caliente, part of	J. S. Berreyesa	17,742.72	Patented July 10, 1873	Sonoma and Napa
.....	Mare Island	G. W. P. Bissell et al.	5,527.22	Final decree not entered	Solano
104	Mariposas, Las	J. C. Fremont	44,386.83	Patented February 19, 1856	Mariposa
111	Medanos, Los	J. D. Stevenson	8,858.83	Patented October 8, 1872	Contra Costa
110	Meganos, Los	Alice Marsh	13,316.00	Patented August 19, 1867	Contra Costa
443	Merced, La	F. P. F. Temple et al.	2,363.75	Patented February 13, 1872	Los Angeles
212	Mesa de Ojo de Agua	T. W. Russell	54.36	Not approved by Com. G. L. O.	Santa Cruz
138	Milpitas	Heirs of J. M. Alviso	4,457.66	Patented June 30, 1871	Santa Clara
307	Milpitas	Ygnacio Pastor	43,280.90	Patented February 18, 1875	Monterey
281	Mission Carmelo	Bishop J. S. Alemany	9.00	Patented October 19, 1859	Monterey
.....	Mission Dolores, lot in	Candelario Valencia	1.78	Patented December 16, 1882	San Francisco
.....	Mission Dolores, lot in	Elizabeth de Zaldo	.45	Sent up for Patent Aug. 26, 1882	San Francisco
161	Mission Dolores, two tracts at	Bishop J. S. Alemany	8.54	Patented March 3, 1858	San Francisco
156	Mission Dolores, lot in	F. DeHaro	2.04	Before Surveyor-General	San Francisco
157	Mission Dolores, lot in	F. DeHaro	.44	Sent up for Patent Aug. 21, 1885	San Francisco
.....	Mission Dolores, lot in	E. & J. R. Valencia	.50	Rejected	San Francisco
160	Mission Dolores, suerte in	Heirs of F. G. Palomares	28.41	Patented April 1, 1870	San Francisco
158	Mission Dolores, suerte in	C. S. de Bernal et al.	5.86	Patented June 13, 1882	San Francisco
372	Mission la Purisima	J. R. Malo	14,735.76	Patented October 12, 1882	Santa Barbara
373	Mission Purisima de la	Bishop J. S. Alemany	14.04	Patented January 24, 1874	Santa Barbara
308	Mission San Antonio	Bishop J. S. Alemany	33.19	Patented May 31, 1862	Monterey
392	Mission San Buenaventura	Bishop J. S. Alemany	36.27	Patented May 23, 1862	Ventura
393	Mission San Buenaventura, lot in	Fernando Tico	28.90	Patented June 9, 1866	Ventura
396	Mission (Ex) San Buenaventura	M. A. R. de Poli	48,822.91	Patented August 24, 1874	Ventura
533	Mission San Diego	Bishop J. S. Alemany	22.21	Patented May 23, 1862	San Diego

We offer in evidence a letter of Commissioner Richards, of the General Land Office, to the Secretary of the Interior, dated September 22, 1905.

(The document was received in evidence, marked "Plaintiff's Exhibit P".)

PLAINTIFF'S EXHIBIT P

[Endorsed]: Filed Aug. 11, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

United States
DEPARTMENT OF THE INTERIOR
General Land Office
Washington

July 10, 1931.

I hereby certify that the annexed copy of letter, dated September 22, 1905, is a true and literal exemplification of the record on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] D. K. PARROTT
Acting Assistant Commissioner of the General Land Office.

1905- 114650.

DEPARTMENT OF THE INTERIOR

General Land Office

Washington, D. C., September 22, 1905.

Address only the

Commissioner of the General Land Office

Subject: Relative to instructing the U. S. Surveyor General to survey lands within the limits of the Mare Island Navy Yard, California.

The Honorable,

The Secretary of the Interior.

Sir:—

I am in receipt, by your reference of September 13, 1905, of a letter dated September 9, 1905, from the Acting Secretary of the Navy, addressed to you, inclosing a letter dated August 19, 1905, from H. H. Rousseau, Civil Engineer, U. S. N., addressed to the Commandant, Navy Yard, Mare Island, California, recommending that the Secretary of the Interior authorize the U. S. Surveyor General of California to survey certain section lines in Township 3 North, R. 4 W., M.D.M., California, within the limits of the Mare Island Navy Yard, embracing "Tide Land Survey No. 34", and inclosing two blue prints showing in red the approximate location of the land included in said Tide Land Survey No. 34; and a letter from the U. S. Surveyor General of California, dated August 12, 1905, in reply to his communication of August 10, 1905, in which the Surveyor General states that only a small portion "of the public land lines in T. 3 N., R. 4-W, M. D.

M. required for your purpose" have been surveyed by the Government, and that:

> "The section lines referred to in Tide Land Survey No. 34, Solano County, are projections from the lines and corners described in the above mentioned field notes, surveyed, if ever by the surveyor making said Tide Land Survey."

In a letter from Mr. Rousseau, above described, reference is made to a suit instituted by E. H. Sawyer in the case of Sawyer vs. McCalla, see 212 Fed. 765 which is expected to come to trial in November, and which he states is being brought against the United States by Sawyer, "who questions the Government ownership to Tide Land Survey No. 34, Solano County, and accretions" lying to the North of the Steam Engineering Buildings, and comprising about 375 acres, which the U. S. Attorney desires to have definitely established; that said Tide Land Survey No. 34 is located and bounded with reference to certain section lines which it becomes necessary to definitely and accurately establish, and it is of considerable importance to the U. S. Attorney, in his defence of said suit,

> "that the section lines referred to in Tide Land Survey No. 34, Solano County, should be projected as soon as possible",

and referring to said blue prints, he calls attention to three corners of the SE¼ of Sec. 10, T. 3 N., R. 4 W., M.D.M., which, he states, "it is desirable

to have located in the usual manner prescribed by law, by the Department of the Interior".

The Acting Secretary of the Navy, in his said letter dated September 9, 1905, addressed to you, requests that if such action can be appropriately taken, instructions be issued to the Surveyor General directing the survey of the lands, at the earliest date practicable.

In your note of reference, you direct this office to take the action requested by the Acting Secretary of the Navy, if practicable, and to advise the Department in the matter.

I have, therefore, the honor to report that the official plats of Ts. 3 and 4 N., R. 4 W, M.D.M., California, show that Mare Island is unsurveyed, and the records show that said island was claimed before the California Land Commission, established by Act of Congress approved March 3, 1851, (9 Stat., 631), by George W. P. Bissell and Wm. H. Aspinwall, under a grant from the Government of Mexico to Victor Castro, he having received a grant to the land by Juan B. Alvarado, May 20, 1841, and it was confirmed to them, (Bissell and Aspinwall), by the Commission, May 8, 1855, and by the U. S. District Court March 2, 1857.

The confirmation by the Commission was by the following description:

> "The place of which confirmation is hereby given is situate in the bay of San Francisco, and is called 'Isla de la Yegua', or Mare Island, and, being an island, is bounded by the water's edge."

The affirmatory decree of the United States District Court is not in this office, and under date of August 7, 1879, the U. S. Surveyor General, in his letter to this office in reply to letter from this office to him, dated July 25, 1879, stated that:

> "Although it appears from the records of the court that a decree of confirmation was ordered to be entered on the 2nd. day of March, 1857, no such decree can be found".

The Surveyor General at that time also transmitted a plat and field notes of the survey of the island executed by James E. Freeman, in July, 1877, under the provisions of the act of Congress approved July 1, 1864, (13 Stat., 332), showing the area of the island to be 5227.22 acres; also a copy of the instructions to Freeman to survey said island; copy of certificate of advertisement, copy of the Decree of Confirmation by the U. S. Board of Land Commissioners, copy of certificate from the Clerk of the U. S. District Court, and extracts from the minutes in the case, and a protest filed in his, (the U. S. Surveyor's General's), office, July 14, 1879, by Bernard F. Hanley, of Washington, D. C., "as attorney for owners".

With reference to the survey as executed by James E. Freeman in 1877, the Surveyor General in his letter dated August 7, 1879, states as follows:

> "I consider the survey incorrect in that, it not only includes tracts which are properly islands in themselves, but also embraces a large quantity of tide land, and should be limited to the area contained South of a line run across

the island from the vicinity of Station No. 54 to Station No. 138".

Copies of said letter, dated August 7, 1879, from the U. S. Surveyor General and its enclosures, above referred to, were forwarded with letter "E" from this office, addressed to you, dated August 3, 1900, in reply to a letter from the Secretary of the Navy dated July 23, 1900, addressed to you.

The records in this office further show that prior to confirmation of the island to Bissell and Aspinwall, the President by his order, dated November 6, 1850, reserved said island for public purposes, and on February 9, 1853, the Secretary of the Navy addressed a letter to the President, recommending the reservation, as a site for a navy yard and naval depot, of Mare Island, describing the land to be reserved, as follows:

> "The tract of land in the Bay of San Francisco, bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island and harbors, waters and anchorages connected therewith, and necessary to the use of the same".

In response to this recommendation, the President, on February 11, 1853, ordered as follows:

> "The reservations above recommended are hereby made, and the Secretary of the Navy will communicate that fact to the appropriate

Department, that the reservations may be legally recorded".

In addition to the foregoing, it is shown that, in eply to a letter from this office dated July 26, 1879, he Secretary of the Navy, under date of August 4, 879, transmitted a copy of deed dated January , 1853, from George W. P. Bissell, Wm. H. Aspinvall, and Mary S. McArthur, to the United States, or the island, in consideration of the sum of 83,491, "to them paid in proportion to their said nterests, respectively", and the land is described in he copy of the deed as follows:

> "All that tract of land and island known as Mare Island, in the Bay of San Pablo, as recently surveyed by the Board of Officers of the United States sent to California for the selection of a site for the Navy Yard there, including all the Tule or low land and marsh belonging to the same, or which has ever been reputed or claimed to belong to the same and all the waters, harbors, bays, creeks, and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging, (excepting only as is hereinafter expressed), with the reversion and reversions, remainder and remainders, rents, issues and profits thereof".

Attached to this copy of said deed is also a copy f the opinion of the Solicitor of the Navy Depart- nent, dated October 20, 1873, addressed to "Commo.

C. R. P. Rogers, Chief of Bureau &c", in which it is stated as follows:—

> "During your absence I have examined the enclosed papers. They show a good title in the U. S. to the whole of Mare Island, upland and marsh.
>
> The decision of the Board of Commissioners of the U. S., under the act of March 3, 1851, is final and conclusive as to the title of Bissell, under whom the U. S. now hold."
>
> If any private claimant is in possession of any part of the island, he should be evicted. If the U. S. have not taken full possession of the island, they should do so without delay".

No further action appears to have been taken in regard to the survey executed by James E. Freeman, above referred to, received with letter from the U. S. Surveyor General dated August 7, 1879, than to endorse on said letter; "See letter from the Secretary of the Navy, dated August 4, 1879", and the letter and its enclosures were placed on file in this office.

The reason that no further action was taken in the matter of executing any further survey under the direction of this office, is obvious. It was shown that the United States purchased the whole of said island as aforesaid, based upon the survey executed by the Board of Officers of the United States, sent to California, presumably by the Navy Department, as enumerated in the copy of deed from Bissell,

pinwall and McArthur, which survey was deemed ficient for the purpose of conveying the land.

In view of the foregoing, I am of the opinion at this office has no authority to survey any land the locality described, for the reason that it is not blic land of the United States, the same having en purchased by the United States from the pri-te land claimants aforesaid who derived their le from the Government of Mexico, as stated, and ere is no appropriation available out of which e expense of surveying other than public lands of e United States and reservations or abandoned servations, under the jurisdiction of this office, uld be paid.

If any further survey of the land is desired, I spectfully submit that it should be executed under e direction of the Navy Department under whose risdiction the land now appears to be.

The papers transmitted by you are returned here-th.

Very respectfully,

W. A. RICHARDS

HW. Commissioner.

We offer in evidence the decision of Commis-ner Tallman, of the General Land Office, dated ptember 16, 1914.

(The document was received in evidence, marked Plaintiff's Exhibit Q".)

PLAINTIFF'S EXHIBIT Q.

[Endorsed]: Filed Aug. 11, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

United States
DEPARTMENT OF THE INTERIOR
General Land Office
Washington

July 10, 1931.

I hereby certify that the annexed copy of decision, dated September 16, 1914, filed under No. 254852, is a true and literal exemplification of the record on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] D. K. PARROTT
Acting Assistant Commissioner of the General Land Office.

In reply please refer to 254852 "G" LWR

3 Ex.

DEPARTMENT OF THE INTERIOR
General Land Office
Washington

September 16, 1914

Address only the
Commissioner of the General Land Office
: Mare Island. Claimed as
: swamp and overflowed land.

Register and Receiver,
San Francisco, California.

Sirs:

July 29, 1912, the State of California, by its State Surveyor General, applied for the certification to it of "all of the swamp and overflowed lands returned as such on the U. S. plats of T. 3 N., R. 4 W., and T. 4 N., R. 4 W., M. D. M., approved March 4, 1863, as provided by Sec. 4 of an Act of Congress to quiet land titles in California, approved July 23, 1866" (14 Stat., 218), now Secs. 2488 and 2489, U. S. Revised Statutes.

The said application is hereby held for rejection for two reasons: 1. No segregation survey of said swamp and overflowed lands, showing their location and area, has been approved. 2. If they be on Mare Island, that was in private ownership under a Mexican grant since May 20, 1841, and so was not subject to the grant made by the Act of September 28, 1850 (9 Stat., 519).

1. It is unnecessary to show that swamp and overflowed lands must be definitely located, with an

approximation to their area, before they can be patented.

2. Mare Island is unsurveyed. It was claimed before the U. S. Board of Land Commissioners for California, established by Act of Congress approved March 3, 1851 (9 Stat., 631), by George W. P. Bissell and William H. Aspinwall, under a grant from the Government of Mexico to Victor Castro, who had received a grant to the island in its full extent from Governor Juan B. Alvarado, May 20, 1841. It was confirmed to those claimants by the Commission on May 8, 1855, and by the U. S. District Court March 2, 1857.

The confirmation by the Commission was by the following description:

The place of which confirmation is hereby given, is situate in the Bay of San Francisco and is called "Isla de la Yegua" or Mare Island, and, being an island, is bounded by the water's edge.

August 7, 1879, the then U. S. Surveyor-General for California transmitted to this office a plat and field notes of the Survey of the island executed by James E. Freeman, in July, 1877, under the provisions of the act of Congress approved July 1, 1864 (13 Stat., 332), showing the area of the island to be 5227.22 acres; also a copy of the instructions to Freeman to survey said island; copy of certificate of advertisement, copy of the Decree of confirmation by the U. S. Board of Land Commissioners, copy of certificate from the Clerk of the U. S. District Court, and extracts from the minutes in the case, and a protest filed in his office, July 14, 1879,

by Bernard F. Hanley, of Washington, D. C., "as attorney for owners."

November 6, 1850, prior to the confirmation of the island to Bissell and Aspinwall, the President of the United States, by executive order of that date, reserved said island for public purposes.

February 9, 1853, the Secretary of the Navy addressed a letter to the President, recommending the reservation of Mare Island as a site for a navy yard and naval depot, describing the land to be reserved as follows:

The tract of land in the Bay of San Francisco, bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of tule or marsh land ordinarily reputed to belong to said island, and harbors, waters and anchorages connected therewith, and necessary to the use of the same.

In response to this recommendation, the President, on February 11, 1853, ordered as follows:

The reservations above recommended are hereby made, and the Secretary of the Navy will communicate that fact to the appropriate Department, that the reservations may be legally recorded.

In addition to the foregoing, it is shown that, in reply to a letter from this office dated July 26, 1879, the Secretary of the Navy, under date of August 4, 1879, transmitted a copy of deed dated January 4, 1853, from George W. P. Bissell, William H. Aspinwill, and Mary S. McArthur, to the United States, for the island, in consideration of the sum of $83,491,

"to them paid in proportion to their said interests, respectively," and the land is described in copy of deed as follows:

All that tract of land and island known as Mare Island, in the Bay of San Pablo, as recently surveyed by the Board of Officers of the United States sent to California for the selection of a site for the Navy Yard there, including all the tule or low land and marsh belonging to the same, or which has ever been reported or claimed to belong to the same, and all the waters, harbors, bays, creeks, and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging (excepting only as is hereinafter expressed), with the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

Attached to this copy of said deed is also a copy of the opinion of the Solicitor of the Navy Department, dated October 20, 1873, addressed to "Commo. C. R. P. Rogers, Chief of Bureau, etc.," in which it is stated as follows:

During your absence I have examined the enclosed papers. They show a good title in the U. S. to the whole of Mare Island, upland and marsh.

The decision of the Board of Commissioners of the U. S. under the act of March 3, 1851, is final and conclusive as to the title of Bissell, under whom the U. S. now holds.

If any private claimant is in possession of any part of the island, he should be evicted. If the U. S. have not taken full possession of the island, they should do so without delay.

No further action appears to have been taken in regard to the survey executed by James E. Freeman, above referred to, received with letter from the U. S. Surveyor General dated August 7, 1879, than to endorse on said letter: "See letter from the Secretary of the Navy, dated August 4, 1879," and the letter and its enclosures were placed on file in this office.

The reason that no further action was taken in the matter of executing any further survey under the direction of this office, is obvious. It was shown that the United States purchased the whole of said island as aforesaid, based upon the survey executed by the Board of Officers of the United States, sent to California, presumably by the Navy Department, as enumerated in the copy of deed from Bissell, Aspinwall and McArthur, which survey was deemed sufficient for the purpose of conveying the land.

The District Court, for the Northern District of California, Second Division, in the case of Sawyer vs. Osterhaus, on February 7, 1914 (212 Fed., 765), decided that, notwithstanding a grant to a State of public lands under a generic description, but dependent upon ascertainment and definition by survey or patent to pass the legal title, until such title is vested in the State, the United States retains full and complete power to devote any portion of such lands to any necessary public purpose. The decision further stated that in the opinion of the U. S. Supreme Court in the case of Wright vs. Roseberry (121 U. S., 488), which was followed in the case of San Francisco Savings Union vs. Irwin (136

U. S., 578), there was some language tending to sustain the theory of law that the swamp-land Act was an absolute grant in praesenti, vesting at once in the State and subjecting to its immediate disposition the legal title to all the lands falling within the class therein described, dependent only on their identification as such without the necessity of patent from the United States to the State, and that this identification, if not had through the Secretary of the Interior and the formal issuance of patent, might be shown, by one holding evidence of title under the State, through the introduction of parole evidence establishing the character of the land as swamp and overflowed at the date of the taking effect of the Act; and that, upon that fact being shown, a perfect legal title is made out, upon which ejectment may be maintained.

The said district court, however, held that that theory had been overruled by the United States Supreme Court itself, saying:

It must now be regarded as definitely settled by the later cases from the Supreme Court that, while concededly the Act was, by its terms, a grant in praesenti, the legal title to the lands granted thereby vests in the State only upon definite identification of the lands to which it attached in the manner provided in the Act, and that, until the ascertainment of that fact and issuance of patent, the legal title remains in the Government and that of the State is merely inchoate.

To sustain this ruling the court cited the cases of Rogers' Locomotive Works vs. Emigrant Co. (164

U. S., 568); Michigan Land etc. vs. Rust (168 U. S., 589); Brown vs. Hitchcock (173 U. S., 476); United States vs. Chicago etc. Railway Co. (218 U. S., 242); McCormick vs. Hayes (159 U. S., 338); and Chapman & Dewey Lumber Co. vs. St. Francis Levee District (232 U. S., 186).

Proceeding upon this *base*, the court further ruled that the President has ample power to reserve and set aside any part of the public domain, whatever its character, for a purpose such as that here involved, which is regarded as a paramount use, and that such reservation, having been made, deprived the State of its right under the swamp-land grant, whether or not Congress makes provisions to indemnify it for the loss.

The lands for which the State now applies, being a part of the tule lands of Mare Island, are covered by the President's orders of reservations dated November 6, 1850, and February 11, 1853.

Whether the view of the law announced in the Osterhaus case be or be not correct, this office finds ample justification for its refusal to recognize the claim of the State to these lands in the facts pertaining to the confirmed Mexican grant to Victor Castro and its subsequent confirmation to his vendees, Bissell and Aspinwall, and in those other facts showing that these lands have never been appropriately identified as swamp land by any approved plat of survey, whether under the Act of Congress of July 23, 1866, or under the law as it existed prior to that date.

As the whole of the island was granted to Castro, such a description would include the lowland or the tule and marsh, as well as the high or uplands.

It is more or less certain that tules or marshes are not any the less land because they happen to be sometimes flooded or at all times wholly or partially covered to some slight extent by water. This is the effect of those decisions of the Supreme Court which hold that a meander line marking the inner border of a marsh does not necessarily make water of all that lies beyond that line, and that purchasers of lots bordering on such meander line do not acquire title to marsh lands lying beyond and outside of it which have been ignorantly or intentionally excluded from survey. (San Francisco City and County vs. Le Roy, 138 U. S., 656; Niles vs. Cedar Point Club, 175 U. S., 300; Gauthier vs. Morrison, 232 U. S., 452).

If these lands are merely swamp lands, then they constituted a part of the island as it existed at the date of the Mexican grant, and by virtue of that grant became the property of the grantee, Victor Castro; on the other hand, if they are and always have been tide lands, subject to the overflow of ordinary high tide, the claim of the State thereto would depend, not on the swamp grant of September 28, 1850, but on its sovereign rights as a State to lands under its navigable waters, with the establishment of title to which this office has no duty to perform and no jurisdiction to exercise.

Allow the State 30 days from notice within which to appeal to the Secretary of the Interior from this

decision. Advise it, moreover, that unless it appeals within the time allowed, its application, which, as stated above, is hereby held for rejection, will be rejected without further notice to it.

Very respectfully,

[Illegible] TALLMAN,
Commissioner.

Board of Law Review
By W. B. Pugh

We offer in evidence the letter of the Secretary of the Navy to the Secretary of the Interior, bearing date, February 12, 1905.

(The document was received in evidence and marked "Plaintiff's Exhibit R".)

PLAINTIFF'S EXHIBIT R.

[Endorsed]: Filed Aug. 11, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES OF AMERICA
Navy Department

I HEREBY CERTIFY that the annexed copy of letter from the Secretary of the Navy to the Secretary of the Interior dated February 12, 1925, is a true and literal exemplification of the record on file in this Department.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the Navy Department of the United States to be affixt, at the

City of Washington, this 14th day of July in the year of our Lord one thousand nine hundred and thirty-one, and of the independence of the United States the one hundred and fifty-sixth.

[Seal] C. F. ADAMS,
Secretary.

Office of the Secretary.
File
11458-38:24 U

DEPARTMENT OF THE NAVY
Washington
12 February 1925.

Honorable Hubert Work,
Secretary of the Interior,
Washington, D. C.

Sir:

Receipt is acknowledged of your letter of January 10, 1925, enclosing a copy of your decision of even date holding that the tract of land known as Survey No. 34 now occupied as a part of the Mare Island Naval Reservation in California was at the date of the passage of the Swamp and Overflowed Land Act of September 28, 1850 (9 Stat. 520) swamp in character, but reserving decision upon the question as to whether said swamp lands should be patented to the State of California for a period of thirty days in order to afford this Department an opportunity to show cause, if any, why it should not be so patented to the State of California.

In this connection I have the honor to submit for your consideration the following:

Under the Treaty of Guadalupe Hidalgo in 1848, the Mexican Government granted to the United States all the land in the then State of California "not heretofore granted in private ownership". California was admitted into the Union as a State on September 9, 1850.

The Swamp Land Act of September 28, 1850, above referred to makes it the duty of the Secretary of the Interior to make out an accurate list and plats of the swamp lands within the public domain, transmit same to the Governors of the several states concerned, and at the request of a Governor of a state containing such swamp lands cause a patent to be issued to said state therefor upon which patent the fee simple title of said swamp lands vests in said state, subject to the disposal of the Legislature thereof.

On December 2, 1851, in his second annual message to Congress, President Fillmore recommended the establishment of a Navy Yard in the Bay of San Francisco, California. Pursuant to said recommendation appropriation was made in Section 3 of the Naval Appropriation Act approved August 31, 1852 (10 Stat., 104), for the establishment of such Navy Yard and authority was conferred upon the Secretary of the Navy to select a site therefor in the Bay of San Francisco in California or in neighboring waters either by purchase or reservation of public lands.

The Secretary of the Navy thereupon appointed a Board of Location and Survey composed of four naval officers, who after an extended investigation

and survey submitted their report to the Secretary on November 6, 1852, recommending that Mare Island be selected as the site for said Navy Yard. This report and recommendation were duly approved by the Secretary of the Navy.

It appears that the title to Mare Island had on May 20, 1841, been granted by the Mexican Government to one Victor Castro. It was thus in private ownership in 1848 when the foregoing Treaty with Mexico was made and hence did not pass to the United States as public lands. The said grant to Victor Castro declared him to be "the owner of the property of the island named 'Yegua' (The Mare) situated in the vicinity of the Straits of Carquines in the entire extent". (Exhibits #1 and 2.)

The Act of March 3, 1851 (9 Stat. 631), provided for a United States Land Commission for the settlement of land titles in California. The title to Mare Island by mesne conveyances from Castro had in the meantime become vested in William H. Aspinwall, George W. Bissell and Mary S. McArthur as tenants in common. Their claim to title to Mare Island was filed before the said Land Commission on August 30, 1852 (Exhibit #3), and after extended hearings was confirmed by said Land Commission on May 8, 1855, in the following language:

> "The place to which confirmation is hereby given is situated in the Bay of San Francisco (San Pablo) and is called the Isla de la Yegua or Mare Island and being an island is bounded by the water's edge." (Exhibits #4, 5 and 6.)

On March 2, 1857, their claim to title was further confirmed by the United States District Court of California, upon appeal from the Land Commission (Exhibit #7). No appeal was taken from this confirmation thus making the proceedings final and conclusive.

On January 4, 1853, George W. Bissell, William H. Aspinwall and Mary S. McArthur, executed a deed conveying to the United States for a consideration of $83,491.00 all that tract of land and island known as Mare Island in the Bay of San Pablo "including all the tule or low land and marsh belonging to the same or which had ever been reputed or claimed to belong to the same and all the waters, harbors, bays, creeks, and other waters, privileges, benefits, advantages, tenements, hereditaments, and appurtenances thereunto belonging". This deed is duly recorded among the land records of California (Exhibit #8).

On February 2, 1853, the Secretary of the Navy transmitted the foregoing deed and other papers in the case to the Attorney General for his opinion on the title to be acquired by the United States thereby (Exhibit #9).

Attorney General Crittenden replied that it appeared that Mare Island is public domain of the United States unless the adverse claims derived from Victor Castro under the grant from the Mexican Government are finally confirmed by the United States Land Commission (Exhibit #10).

On February 9, 1853, the Secretary of the Navy advised the President of his selection of Mare

Island as the site for the Navy Yard and Depot and stated that an investigation of title has *lead* to some doubt whether the Government does not already possess the paramount right to the occupation and use of this island and that his own opinion is that whether the title shall be found to exist in the United States or not it is proper that the Government should reserve the land for public use and thus assert a title which will at least serve to strengthen any other which may ultimately be purchased. Said letter further requested the President, if he should concur in the propriety of making the reservation, to give the necessary orders to that end and direct that the tract of land in the Bay of San Francisco bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of tule or marsh land ordinarily reported to belong to said island, etc., the harbors, waters and anchorages connected therewith and necessary to the use of the same be reserved to the United States for public uses (Exhibit #11).

On February 11, 1853, the President endorsed on said papers the following:

> "The reservations above recommended are hereby made and the Secretary of the Navy will communicate that fact to the appropriate Department that the resolution may be properly and legally recorded." (Exhibit #12.)

On February 12, 1853, the Secretary of the Navy advised the Secretary of the Interior of the Presi-

dent's action and requested that the necessary order and notice be given to effect the reservation thus made. (Exhibit #13.)

On April 2, 1853, the Secretary of the Navy requested the Attorney General's opinion as to whether under the provisions of the Act of March 3, 1853, the funds appropriated therein may legally be expended for certain objects of construction at Mare Island. This Act appropriated the sum of $100,000 for such purpose with the proviso "that before this sum shall be expended, the Attorney General of the United States shall decide that the United States have good title to the land upon which buildings are to be erected." (Exhibit #14.)

Attorney General Cushing in his reply of the same date stated:

> "I recommend therefor as an indispensable prerequisite to any legal expenditure of public money on Mare Island,—
>
> "First, that due investigation be had, through the District Attorney for the Northern District of California, or otherwise, into the claim of Henry Sanford, and any other ground of individual claim of date subsequent to the conquest.
>
> "Secondly, that the State of California be invited to relinquish to the United States whatever claim, if any, she may have, to the shores or the overflowed land on Mare Island." (Exhibit #15.)

The said claim of Henry Sanford was duly disposed of and on October 3, 1853, the Secretary of the Navy transmitted a copy of the Attorney Gen-

eral's opinion to the Governor of the State of California and requested that the necessary action be taken to have the State Legislature authorize the cession of lands as indicated by the Attorney General. (Exhibit #16.)

On May 11, 1854, the Legislature of the State of California passed an act declaring its consent to the purchase by the United States of Mare Island and to relinquish the title and interest of the State in overflowed beach or swamp lands on the eastern shore of said island from the southern point thereof to a parallel intersecting the northern point of the highlands, etc. (Exhibit #17.) The area of this cession by the State of California was limited to the area for which development plans for naval purposes at that time had been prepared and submitted and has no decisive bearing upon the title to the remaining area of Mare Island than claimed by the United States.

A further cession was made by the act of March 9, 1897, (Cal. Stat. 1897, page 74), of all the right and title of the State of California in and to the lands extending from highwater mark out to 300 yards beyond low-water mark, lying adjacent and contiguous to any island, the title to which is in the United States or which island is reserved by the United States for any military or naval purpose or for defense. (Exhibit #18.)

On October 20, 1873, the Solicitor and Naval Judge Advocate General rendered a decision holding that the Mare Island papers show a good title in the United States to the whole of Mare Island [illegible] is final and conclusive as to the title of

Bissell, et al, under whom the United States now hold. (Exhibit #19.)

The extent of the area of Mare Island on January 4, 1853, when it was acquired by the United States, seems to have been fully explained by the Board of Location and Survey in its report which as heretofore stated was submitted to the Secretary of the Navy on November 6, 1852. A most diligent search has failed to locate this report. A supplemental report of the Board, however, dated December 13, 1852, in response to the Secretary of the Navy's request of even date, contains the following information on this point:

> "The island, including the tule opposite Vallejo, contains about 900 acres, in addition to a large tract of tule extending towards Napa and Sonoma". (Exhibits #20 and 21).

This shows that at that time Mare Island included the tule opposite Vallejo, and also the large tract of tule extending towards Napa and Sonoma.

That this tule or marsh land was an integral part of Mare Island is conclusively shown by the accompanying charts prepared by Commander Ringgold, U. S. Navy, and Lieutenant Simon F. Blunt, U. S. Navy, in 1850. (Exhibits #22 and 23.) These charts give the soundings of Napa Creek and the high water mark surrounding the island, clearly establishing the fact that the tule land was at that time all above high-water and an integral part of Mare Island. Exhibits #24 and 25, submitted herewith, accompanied the Board's report in 1852 and are the only charts accompanying said report which can

now be located. These latter exhibits appear to have been based on Exhibits #22 and 23, but they only show the highlands of Mare Island which at that time were considered for the development plans for the Navy Yard and they eliminate the tule lands intended to be used for target practice and other naval uses. They are, therefore, not indicative of the entire tract acquired by the United States under the foregoing deed of January 4, 1853. There are also submitted herewith Exhibits #26 and 27 of surveys made by the United States Coast and Geodetic Survey in 1859 and 1863, respectively, showing conclusively the high-water mark surrounding Mare Island and clearly establishing the fact that the tule lands were physically an integral part of Mare Island. The notes of these surveys are on file in the office of the United States Coast and Geodetic Survey, 205 New Jersey Avenue, S. E., Washington, D. C., to which reference is hereby made.

From the foregoing it seems clear that the grant to Victor Castro of Mare Island "in the entire extent" included all of the tule lands which physically formed an integral part thereof. If it had been intended to eliminate the tule lands from this grant such sweeping language would not have been used. The words "in the entire extent" clearly indicate that it was intended to grant all lands which in any way were connected with and formed part of Mare Island.

In the case of Sawyer v. Osterhaus (212 Fed. Rep., 765), the boundaries of Mare Island were aptly defined as follows:

"* * * Its southerly projection resting in San Pablo Bay consists of a compact body of high land having a general resemblance to the low hill or rolling land found on the adjacent mainland from which higher part or head there extends to the northwest a low narrow neck or strip, connecting it with a much larger body of low, swampy land, spreading out fan-like for several miles in the same general direction. This body of land as thus described was bounded by San Pablo Bay on the south and west; by Mare Island Straits and Napa Bay on the east; and Sonoma Creek on the north, all navigable."

The description given in the confirmation of title by the Land Commission and by the United States District Court of California as "being an island is bounded by the water's edge" must have referred to the navigable waters named in the description given in the Sawyer case. No other construction seems logical in view of the foregoing exhibits showing the high-water mark of Mare Island.

The Navy Department, therefore, maintains that under the foregoing deed of January 4, 1853, it acquired all of Mare Island extending from San Pablo Bay on the south and west to Mare Island Straits and Napa Bay on the east and Sonoma Creek on the north as confirmed by the Land Commission and the United States District Court of California and as granted to Victor Castro by the Mexican Government. This being true, it follows that Mare Island as thus described, did not pass to the United

T. 4 N. R. 5 W.

T. 4 N., R. 4 W.

PLAT

of

ISLA DE LA YEGUA OR MARE ISLAND

Finally confirmed to

George W. Bissell and William T. Aspinwall

Surveyed under instructions from the

U.S. SURVEYOR GEN'L

by

James E. Freeman, dep. sur.

July 1877

Containing 5227 $\frac{82}{100}$ Acres

Scale 4 Inches to 1 Mile

Var. 16° E.

Hiuchica Slough

Yard

Slough

Mare

BAY OF SAN

T. 3 N., R. 4 W.

Boundaries T. 3 N., R. 5 W

No.	Course	Dist.	No.	Course	Dist.	No.	Course	Dist.	No.	Course	Dist.
1	S. 60° E.	11.00	17	N. 30° W.	5.00	33	S. 60° E.	11.00	49	N. 30° W.	9.00
2	S. 30° E.	16.00	18	N. 60° W.	4.00	34	N. 30° E.	8.00	50	N. 60° W.	6.00
3	S. 60° E.	3.00	19	N. 30° E.	2.00	35	S. 60° E.	14.00	51	S. 30° W.	12.75
4	S. 30° E.	3.00	20	N. 60° W.	2.00	36	S. 30° E.	8.00	52	N. 60° W.	12.50
5	S. 60° E.	7.00	21	N. 30° E.	4.00	37	N. 60° E.	4.00	53	N. 30° E.	3.00
6	S. 30° E.	3.00	22	N. 60° W.	4.00	38	S. 30° E.	4.00	54	N. 60° W.	5.00
7	S. 60° E.	3.00	23	N. 30° E.	4.00	39	S. 60° E.	4.00	55	S. 30° W.	9.87
8	S. 30° E.	3.00	24	N. 60° W.	3.00	40	S. 30° E.	4.00	56	N. 60° W.	8.50
9	S. 60° E.	1.00	25	N. 30° E.	2.00	41	S. 60° E.	2.00	57	S. 30° W.	30.13
10	S. 30° E.	1.00	26	N. 60° W.	4.00	42	S. 30° E.	2.00	58	S. 60° W.	9.00
11	S. 60° E.	3.00	27	N. 30° E.	4.00	43	S. 60° E.	2.00	59	S. 30° W.	23.50
12	S. 30° E.	1.00	28	N. 60° W.	4.00	44	S. 30° E.	2.00	60	[illegible]	[illegible]
13	S. 60° E.	3.00	29	N. 30° E.	4.00	45	S. 60° E.	2.00	61	S. 77° W.	10.11
14	S. 30° E.	3.00	30	N. 60° W.	4.00	46	S. 30° E.	2.00	62	N. 30° E.	17.00
15	S. 60° E.	3.00	31	N. 30° E.	4.00	47	S. 60° E.	2.00	63	N. 60° W.	30.00
16	S. 30° E.	3.00	32	N. 60° W.	4.00	48	S. 30° E.	2.00	64	S. 30° W.	11.92
17	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	65	S. 73° E.	6.07
18	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	66	S. 0° E.	21.00
19	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	67	S. 60° W.	22.36
20	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	68	S. 30° W.	20.00
21	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	69	N. 60° W.	15.00
22	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	70	S. 30° W.	17.00
23	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	71	S. 60° E.	[illegible]
24	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	72	S. 30° W.	23.00
25	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	73	N. 60° W.	8.00
26	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	74	S. 30° W.	6.00
27	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	75	S. 60° E.	11.00
28	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	76	S. 30° W.	10.00
29	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	77	S. 60° E.	11.00
30	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	78	S. 30° W.	10.00
31	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	79	S. 60° E.	11.00
32	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	80	S. 30° W.	10.00

I hereby certify that in conformity with the provisions of the Act of Congress approved July 1st 1864, this survey and plat were advertised in the "Vallejo Evening Chronicle" published in the County of Solano, for four weeks, the date of the first publication thereof being the 11th of October 1877: also in the "Alta California" published in the City and County of

2-1

PLAINTIFF'S EXHIBIT 8.

[Endorsed]: Filed Aug. 11, 1931. United States District Court.
Filed Jun. 18, 1934. United States Circuit Court of Appeals.

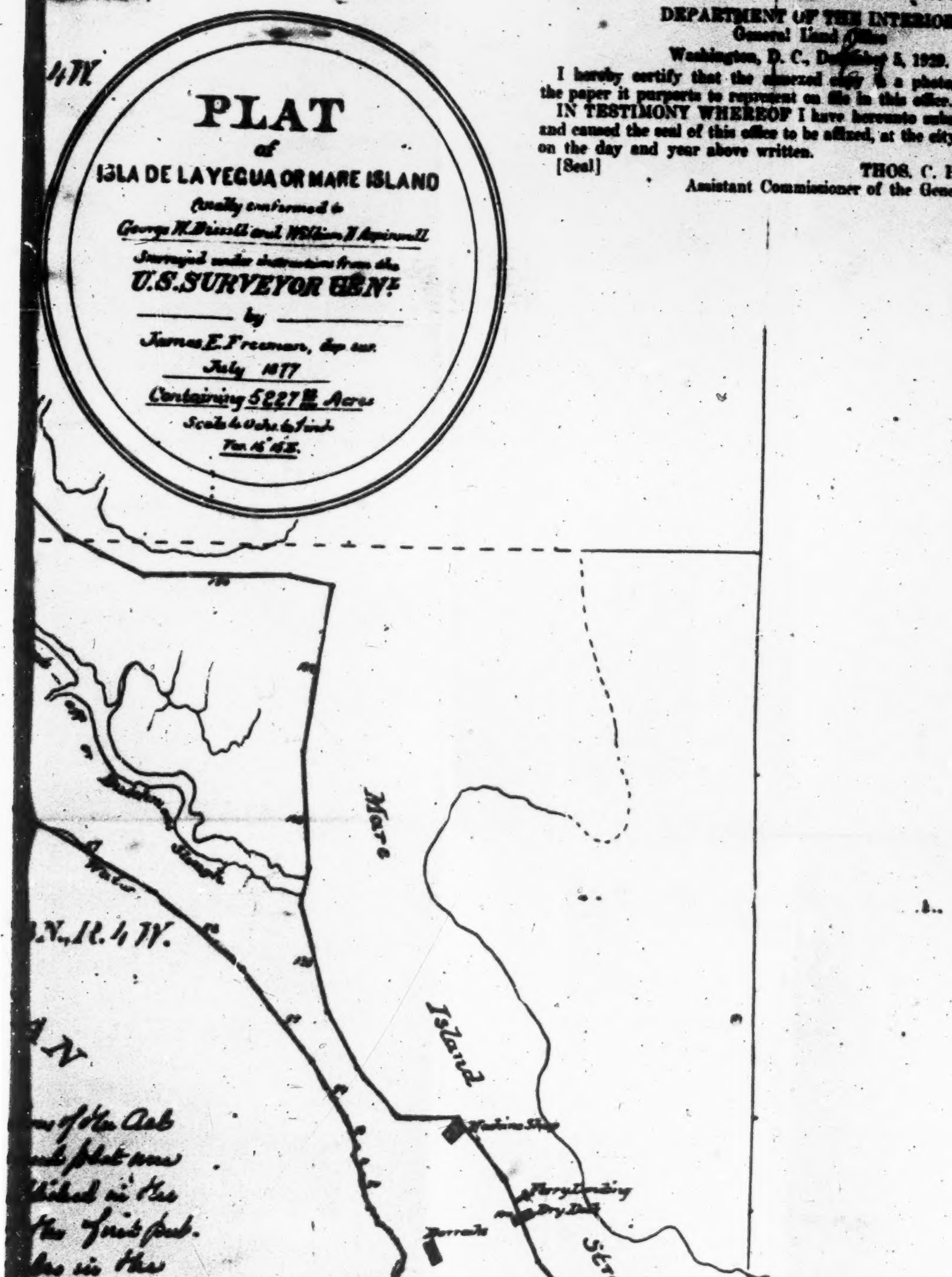
DEPARTMENT OF THE INTERIOR
General Land Office
Washington, D. C., December 5, 1929.

I hereby certify that the annexed copy is a photographic copy of the paper it purports to represent on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal]

THOS. C. HAVELL,
Assistant Commissioner of the General Land Office.



States as public lands under the Treaty of Guadalupe Hidalgo because it had theretofore been granted in private ownership. It further follows that it did not form a part of the public domain remaining unsold on September 28, 1850, and is therefore not subject to be patented to the State of California under the terms of the Swamp Land Act of that date. The executive order of the President dated February 11, 1853, as above stated, was issued only as a precaution to reserve said lands in the event that the claim of the successors of Castro was not confirmed by the Land Commission. Said claim, however, having been confirmed, the executive order was of no effect.

Respectfully,
CURTIS D. WILBUR
Secretary of the Navy.

We offer in evidence the certified field notes and report of James E. Freeman, United States Deputy Surveyor, made in 1877, con- [247] taining instructions, copy of the minutes of the District Court, copy of the decree of the Land Board, copy of Certificate of Publication of Survey, copy of field notes, protest by B. T. Hanley to United States Surveyor General, protest by B. T. Hanley to the Commissioner of the General Land Office, copy of the Darlington Survey of 1855, and United States Surveyor General Wagner's letter of August 7, 1879.

(The documents were received in evidence, marked "Plaintiff's Exhibit S".)

County of Solano, for four weeks, the date of the first publication thereof being the 11th of October 1877: also in the "Alta California" published in the City and County of San Francisco, for four weeks; the date of the first publication thereof being the 11th of October 1877. This plat remained in this office, subject to inspection, during ninety days from the date of the first publication

U. S. Surveyor General's Office
San Francisco, California
August 6th 1879

Thos Wagner
U. S. Surv. Genl Cal

A full, true and correct copy of the original plat as the same appears of record and on file in this Office.

Wilmington General Office
San Francisco, Cal. Aug 6th 1879.

Thos Wagner
U. S. Surv. Genl.

Straits
Sec 24
Sec 19
Sec 25
Sec 30
PABLO

PLAINTIFF'S EXHIBIT S.

[Endorsed]: Filed Aug. 11, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

DEPARTMENT OF THE INTERIOR
General Land Office
Washington, D. C., December 5, 1929.

I hereby certify that the annexed copy is a photographic copy of the paper it purports to represent on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] THOS. C. HAVELL,
Assistant Commissioner of the
General Land Office.

U. S. Surveyor-General's Office,
San Francisco, Cal.
July 19, 1877.

James E. Freeman,
U. S. Deputy Surveyor.

Sir,—

Whereas, it appears by a certified copy of a decree placed on file in this office, that the claim of George W. Bissell and William H. Aspinwall to a tract of land named Isla de la Yegua, or Mare Island, has been finally confirmed by The Commission for ascertaining and settling the Private Land Claims in California, and by the U. S. District Court for the Northern District of Cal.

And Whereas, application has been made by the interested parties, for a survey and location of said claim, I have thought proper to appoint you my Deputy in this special case, for the execution of the survey thereof.

Agreeably to the decree in the matter, the claim herein referred to is confirmed in favor of the said claimants, to the following effect: "The place of which confirmation is hereby given is situate in the bay of San Francisco, and is called Isla de la Yegua; or Mare Island, and being an Island is bounded by the water's edge."

Section 7 of the Act of Congress of July 1st, 1864, provides:

> "That it shall be the duty of the Surveyor-General of California, in making Surveys of the Private Land Claims finally confirmed, to follow the Decree of Confirmation as closely as practicable, whenever such decree designates the specific boundaries of the claim; but when such decree designates only the out-boundaries within which the quantity confirmed is to be taken, the location of such quantity shall be made, as near as practicable, in one tract and in a compact form. And if the character of the land, or intervening grants, be such as to render the location impracticable in one tract, then each separate location shall be made, as nearly as practicable, in a compact form."

You will therefore make your Survey in accordance with the requirements of the law, and said Decree of Confirmation.

You will therefore accurately ascertain and properly measure, run and mark the exterior boundaries of the claim, and restrict it to the confirmed quantity.

In all other respects you will comply with the printed instructions of this office, dated April 9th, 1864, a copy of which is herewith inclosed for your information and guidance.

[Seal] H. G. ROLLINS
U. S. Surveyor-Gen'l, California.

Duplicate

U. S. Surveyor General's Office
San Francisco, Cal., Aug. 6, 1879.

A full true and correct copy of the original as the same remains of record and on file "in duplicate" in this office.

Attest: Theo. Wagner,
U. S. Sur. Gen'l

Instructions.
July 19th, 1877
Rancho
Isla de la Yegua, or Mare Island
Jas. E. Freeman,
Dep. Surveyor.

DEPARTMENT OF THE INTERIOR
General Land Office
Washington, D. C., December 5, 1929

I hereby certify that the annexed copies are photographic copies of the papers they purport to

represent on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] THOS. C. HAVELL,
Assistant Commissioner of the General Land Office.

311 The United States .
vs.
G. W. P. Bissell & W. H. Aspinwall
1855 "Ysla de Yegua, or Mare Island"
October 13 Filed Transcript from U. S. Land Com.; in case No. 307.

1856
Feby. 1 Filed Notice of Appeal from Atty. Genl.

1857
March 2 " Decree of Confirmation.
April 1 " Order granting Appeal.

I, Southard Hoffman, clerk of the District Court of the United States for the District of California, do hereby certify the foregoing to be a full, true and correct copy of the Register entries in the case of the United States vs. G. W. P. Bissell & W. H. Aspinwall No. 311 in said court, and I further certify that on the Minutes of said Court for the 2nd day of March 1857 an entry appears enumerating a number of cases among which is the case of the United States vs. Bissell & Aspinwall to which the

following minute is appended "Decree of confirmation was entered in each of these cases by consent of the United States Dist. Attorney." And after due and diligent search I have been unable to find any Decree of Confirmation on file or of record in said case.

Attest my hand and seal of said District Court, this 4th day of August, A. D. 1879.

SOUTHARD HOFFMAN.
Clerk U. S. Dist. Court Dist. Cal.

[Insignia]

Office of the Surveyor-General,
Of the United States, for California.

I, T. Wagner, Surveyor-General of the United States for the State of California, Do Hereby Certify, that the page preceding, and hereunto annexed, is a full, true and correct copy of a certain instrument of writing now of record and on file in this office, and in my custody; that I have carefully compared the same with said original, and that the same is a correct transcript therefrom, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused my Seal of Office to be affixed, at the City of San Francisco, this Sixth day of August, 1879.

THEO. WAGNER,
U. S. Surveyor-General for California.

DEPARTMENT OF THE INTERIOR
General Land Office
Washington, D. C., December 5, 1929.

I hereby certify that the annexed copies are photographic copies of the papers which they purport to represent on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] THOS. C. HAVELL,
Assistant Commissioner of the
General Land Office.

No. 307

George W. Bissell et al.

vs.

The United States.

In this case after hearing the proofs and allegations it is adjudger *of* commission that the claim of the said petitioners here in is valid and it is therefore decreed that their application for a confirmation thereof be allowed.

The place of which confirmation is hereby given is situate in the bay of San Francisco and is called "Isla de la Yegua" or Mare Island, and being an Island is bounded by the water's edge.

R. AUG. THOMPSON
S. B. FARWELL
Commissioners.

[Endorsed]: No. 307. G. W. P. Bissell et al. Isla de la Yegua. Decree of confirmation.

Filed in office May 8, 1852 Geo. Fisher Secy.

Recorded in Record of decisions Vol. 2 page 647 Geo. Fisher Secy.

[Insignia]

Office of the Surveyor-General,
Of the United States, for California.

I, T. Wagner, Surveyor-General of the United States for the State of California, Do Hereby Certify, that the page preceding, and hereunto annexed, is a full, true and correct copy of a certain instrument of writing now of record and on file in this office, and in my custody; that I have carefully compared the same with said original, and that the same is a correct transcript therefrom, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused my Seal of Office to be affixed, at the City of San Francisco, this Sixth day of August, 1879.

THEO. WAGNER,
U. S. Surveyor-General for California.

DEPARTMENT OF THE INTERIOR
General Land Office
Washington, D. C., December 5, 1929.

I hereby certify that the annexed copy is a photographic copy of the paper it purports to represent on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] THOS. C. HAVELL,
Assistant Commissioner of the
General Land Office.

U. S. Surveyor General's Office,
San Francisco, January 18, 1878

I HEREBY CERTIFY, that by virtue of the provisions of the Act of Congress, approved 1st July, 1864, entitled "An Act to Expedite the Settlement of Titles to Lands in the State of California," notice of the plat and survey having been made of the rancho Isla de la Yegua, or Mare Island, finally confirmed to George W. Bissell & Wm. H. Aspinwall, surveyed by Jas. E. Freeman, U. S. Deputy Surveyor, in July 1877, has been advertised in accordance therewith in two newspapers, to wit: the Vallejo Evening Chronicle published in the County of Solano, State of California, being near to where the said land is located: the first publication being

on the 11th day of October 1877, and the last on the 8th day of November 1877; also in the Alta California a newspaper published in the City and County of San Francisco, State aforesaid; the first publication being on the 11th day of October 1877, and the last on the 8th day of November 1877. And that the plat of said survey was retained in this office subject to inspection during all of ninety days, and until the expiration thereof from the date of the first publication.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially, and caused my seal of office to be affixed in the City of San Francisco, this 18th day of January 1878.

[Seal] J. W. AMES,
U. S. Surveyor General for California.

U. S. Surveyor General's Office.
San Francisco, Cal. Aug. 6, 1879

I hereby certify that the foregoing is a full, true and correct copy of the original record of publication in the case of the survey of Mare Island as the same appears of record and on file in this office.

Attest.
THEO. WAGNER,
U. S. Sur. Gen'l.

United States
DEPARTMENT OF THE INTERIOR
General Land Office
Washington

December 4, 1929.

I hereby certify that the annexed copy of field notes of survey of "Isla de la Yegua" or "Mare Island", is a true and literal exemplification of the record on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] THOS. C. HAVELL,
Assistant Commissioner of the
General Land Office.

FIELD NOTES
OF
The survey of "Isla de la Yegua" or
"Mare Island,"
Situated in Sonoma County,
State of California
Granted by Juan B. Alvarado to
Victor Castro May 20th, 1841.
Finally confirmed to
Geo. W. Bissell & William H. Aspinwall,
by the U. S. District Court, March 2d, 1857.
Surveyed by James E. Freeman.
Date of Contract June 28th, 1876.
Date of Instructions July 19th, 1877.
Survey commenced July 24th, 1877.
Survey completed August 1st, 1877.

PRELIMINARY OATH OF ASSISTANTS.

I, ...do solemnly swear that I will well and truly perform the duties of Compassman, according to instructions given me, and to the best of my skill and ability.

.....

Subscribed and sworn to before me, this.....day of.....187.....

.....

U. S. Deputy Surveyor

We, DANIEL SCULLY and N. W. BREW do solemnly swear that we will faithfully execute the duties of Chain Carriers; that we will level the chain upon uneven ground, and plum the tally pins, whether by sticking or dropping the same; that we will report the true distance to all notable objects, and the true length of all lines; that we will assist in measuring, to the best of our skill and ability.

his
DANIEL X SCULLY
mark
N. W. BREW.

Subscribed and sworn to before me, this 24th day of July, 1877.

C. W. REILLY,
Justice of the Peace,
Vallejo, Solano Co., Cal.

I, Thomas Dixon do solemnly swear that I will well and truly perform the duties of Flagman according to instructions given me, and to the best of my skill and ability.

THOMAS DIXON

Subscribed and sworn to before me, this 24th day of July, 1877.

C. W. REILLEY,
Justice of the Peace,
Vallejo, Solano Co., Cal.

I, John Charlton, do solemnly swear that I will faithfully execute the duties of chain carrier or flagman according to the best of my skill and ability.

JOHN W. C. CHARLTON.

Sworn and subscribed to before me this 25th day of July, 1877.

CHAS. W. RILLEY,
Justice of the Peace in and for Vallejo,
Township—Solano Co., Cala.

In order to connect the survey of Mare Island with a section corner of the Public Land Survey's, I begin at the quarter sec. corner, bet. secs. 13 & 18. Ranges No. 3 & 4 West. Township No. 3 North, Mt. Diablo base & Meridian and run South 120 chains to the cor. of secs. 19, 24, 25 & 30.

Now commencing at the water edge on the Easterly side of Mare Island, West of the Sec. corner set a post 4 x 4 x 40 inches marked S. 24 & 25 bears West 25 links distant standing by a prominent flag pole of the U. S. Coast Survey.

July 24th, 1877.

Thence along the water's edge at ordinary high water mark.

Var. 16° 15' E.

1	S. 40° E.	23.90	The cor. of secs. 19, 24, 25 & 30 on main land brs. N. 46° E.
		31.40	
2	S. 27½° E.	12.70	S. E. cor. of Magazine brs. West 50 lks.
		15.00	
3	S. 40¼° E.	3.50	
4	S. 36½° W.	3.50	
5	S. 69° W.	7.50	
6	S. 16° E.	3.70	
7	S. 13¼° W.	2.50	
8	S. 41° W.	2.60	
9	S. 75° W.	1.60	
10	S. 86½° W.	5.00	

11	S. 30°	W.	4.20	
12	S. 85½°	W.	2.00	
13	S. 62°	W.	8.10	Light House 2 chs. North.
14	N. 54°	W.	40.00	
15	S. 80°	W.	2.30	
16	S. 86½°	W.	3.50	
17	N. 74½°	W.	3.60	
18	N. 66½°	W.	2.70	
19	N. 33°	W.	1.90	
20	N. 87°	W.	1.00	
21	N. 48½°	W.	1.84	
22	N. 47½°	W.	10.50	
23	N. 77°	W.	2.50	
24	S. 55°	W.	2.50	
25	N. 43½°	W.	1.00	
26	N. 31°	W.	29.00	
27	N. 60½°	W.	3.20	
28	S. 77°	W.	2.90	
29	N. 5°	W.	4.50	
30	N. 23½°	W.	4.30	
31	N. 31°	E.	1.20	
32	N. 33½°	W.	4.70	
33	N. 25°	W.	3.30	
34	N. 32½°	W.	10.00	
35	N. 25½°	W.	26.10	S. W. Cor. of Barracks brs. N. 44 E.
				July 25th, 1877.
36	N. 4½°	E.	2.00	
37	N. 24°	W.	5.50	
38	N. 30°	E.	3.30	
39	N. 31½°	E.	2.20	
40	N. 17°	E.	5.40	S. W. cor. of Barracks brs. S. 75° E.
41	N. 31°	W.	6.00	
42	N. 40°	W.	4.00	
43	N. 50½°	W.	3.30	
44	N. 83½°	W.	2.00	
45	N. 16°	W.	2.70	
46	N. 43°	W.	1.90	
47	N. 14°	W.	1.70	
48	N. 72½°	W.	1.40	
49	N. 18½°	W.	5.60	

50	N. 10°	W.	7.00	
51	N. 26½°	W.	7.00	
52	N. 19°	E.	4.20	
53	N. 22°	W.	6.00	To Tide Lands thence along Tide Lands.
			12.00	
54	N. 34°	W.	24.00	
55	N. 40°	W.	44.00	
56	N. 52°	W.	44.00	
57	N. 61°	W.	64.00	
58	N. 64°	W.	36.00	
59	N. 70°	W.	196.00	
60	N. 61°	W.	40.00	
61	N. 62°	W.	15.00	
62	N. 58¼°	W.	25.00	
63	N. 67°	W.	13.50	
64	N. 86¼°	W.	4.00	A fishermans cabin 1 ch. North.
				July 26th, 1877.
65	N. 50½°	W.	7.50	
66	N. 79½°	W.	18.00	
67	N. 55°	W.	5.00	
68	N. 81°	W.	23.00	
69	N. 67½°	W.	10.00	Leaves San Pablo Bay.
			"	To mouth of Sonoma Creek comes from N. W.
70	N. 63¼°	W.	40.00	
71	N. 23¼°	W.	8.00	Point of Land at the confluence of the Huichica Slough & Sonoma Creek brs. N. 50° W. about 10 chs. dist. Thence along Huichica Slough.
72	N. 26¾°	E.	4.50	
73	N. 63½°	E.	11.50	
74	N. 87½°	E.	23.00	
75	N. 87°	E.	41.00	
76	East		11.50	
77	S. 74½°	E.	40.00	
78	S. 85½°	E.	10.70	
79	N. 75¼°	E.	9.50	

80	N. 60½°	E.	18.00	To a point opposite the junction of South or "Navy Yard" Slough with "Middle Napa" Slough, thence up South or Navy Yard Slough.
81	S. 36°	E.	2.30	
82	S. 1½°	W.	7.00	
83	S. 5°	W.	11.70	
84	S. 6½°	E.	7.50	
85	S. 37°	E.	7.00	July 27th, 1877.
86	S. 75½°	E.	4.00	
87	East		6.70	To the Westerly Mouth of Montgomery Slough crs. S. E. 2 chs. wide.
88	N. 41°	E.	4.00	
89	N. 35½°	E.	12.00	
90	N. 22°	E.	12.50	
91	N. 3½°	E.	26.00	
92	N. 10°	W.	22.00	
93	N. 56½°	E.	5.00	
94	S. 65½°	E.	20.00	
95	S. 78°	E.	4.00	
96	N. 87½°	E.	11.00	
97	S. 61°	E.	1.50	
98	S. 52°	E.	4.40	
99	S. 3½°	E.	5.50	
100	S. 15°	W.	10.40	
101	S. 6¼°	W.	8.00	
102	S. 8°	E.	11.00	
103	S. 30°	E.	8.50	To Easterly Mouth of Montgomery cut off or slough crs. S. W.
			9.98	Over same.
104	S. 74½°	E.	20.00	
105	East		21.00	
106	N. 56¼°	E.	12.50	
107	N. 23¼°	E.	8.00	
108	N. 11½°	E.	8.50	
109	N. 63½°	E.	9.00	
110	N. 60½°	E.	6.58	
111	S. 63¾°	E.	13.76	
112	N. 64½°	E.	12.60	

113	N. 82°	E.	3.18	July 28th, 1877.
114	S. 23¾°	E.	2.18	
115	S. 25½°	W.	4.47	
116	S. 61¾°	W.	8.94	
117	S. 35½°	W.	28.13	
118	S. 10¾°	W.	9.60	
119	S. 33°	E.	23.20	
120	S. 15°	E.	16.14	
121	S. 51½°	E.	14.56	
122	S. 77¾°	E.	10.53	
123	N. 75¼°	E.	17.90	
124	N. 43½°	E.	39.50	
125	N. 60½°	E.	11.92	
126	S. 73°	E.	4.97	
127	S. 9°	E.	23.55	Boat cut off or Dutchmans
128	S. 46¾°	E.	23.76	slough 1 ch. wide.
129	S. 65½°	E.	34.00	
130	N. 89°	E.	56.56	Leave Navy Yard or South Slough and enter creek.
131	S. 78½°	E.	17.10	
132	S. 9½°	W.	60.00	
133	S. 4½°	E.	42.70	To South Easterly mouth of Boat Cut off or Dutchmans slough 6 chs. wide co. N. W.
134	S. 13¾°	W.	13.91	
135	S. 16½°	E.	40.50	
136	S. 31½°	E.	23.11	
137	S. 42½°	E.	24.60	
138	East		23.21	To the Northerly cor. of Machine Shop.
			"	Leave Tide Lands.
				July 29th, 1877.
139	S. 40½°	E.	28.50	
140	S. 24½°	E.	8.63	To Ferry Boat Wharf co. N. E. & S. W.
			14.00	To Dry Dock.
			33.15	
141	S. 42°	E.	37.42	
142	S. 38°	E.	33.46	
143	S. 19°	E.	6.45	To the place of beginning
				Containing 5227-22/100 acres

GENERAL DESCRIPTION

With the exception of a narrow strip of land on the Easterly side of the Island, all that portion where the Navy Yard is situated extending Southerly from the Machine shop, is high dry ground rising gradually towards the South.

At the Southerly end of the Island the bluffs appear to be about 200 ft. in height—soil generally first rate.

That portion extending North Westerly from the Machine shop, is tide or swamp land producing tule & other salt marsh grasses.

The "Boat Cut off" known also as "Dutchmans slough" is about 60 lks. wire near its Westerly end —widening out towards the South Easterly end to 8 to 10 chains.

The South or Navy Yard slough varies in width from 6 to 10 chains.

The Northern boundary is entered by numerous small sloughs which ramify this portion of the Island in every direction. Owing to the action of the tides all the sloughs are very broad at their entrance but narrow rapidly as they extend inland. Sailing vessels of Light Draught can pass around Mare Island by way of South or Navy Yard slough.

Several Iron Monuments are erected near the water's edge along the Northern boundary with notices thereon forbidding persons to trespass on the lands, as they are claimed by the U. S. Government.

August 1st, 1877.

JAS. E. FREEMAN

WE DO HEREBY CERTIFY, that we assisted Jas. E. Freeman, U. S. Deputy Surveyor, in surveying the boundary lines of the Rancho Isela de la Yegua or Mare Island situated in the County of Sonoma in the State of California, and finally confirmed to Geo. W. Bissell & William H. Aspinwall, and that said Rancho has been in all respects, to the best of our knowledge and belief, well and faithfully surveyed, and the boundary monuments established according to the laws of the United States, and the instructions of the Surveyor-General.

_____Compassman,

N. W. BREW Chainman,

JOHN W. C. CHARLTON Chainman,

His

DANIEL X SCULLY Axeman,

mark

THOMAS DIXON Flagman.

Subscribed and sworn to before me this 1st day of August, 1877.

CHAS. W. RILLEY,

Justice of Peace

Vallejo—Solano Co., Cala.

I, Jas. E. Freeman, U. S. Deputy Surveyor, do solemnly swear that, in pursuance of instructions from H. G. Rollins, U. S. Surveyor-General for the State of California, bearing date the 19 day of July, 1877, and in strict conformity to the laws of the United States and the said instructions from the Surveyor-General, I have well and faithfully

surveyed the boundary lines of the Rancho Isla de la Yegua or Mare Island situated in the County of Sonoma in the State of California, and finally confirmed to Geo. W. Bissell & William H. Aspinwall and I do further solemnly swear that the foregoing are the true and original field notes of said survey.

JAMES E. FREEMAN,
U. S. Deputy Surveyor.

Subscribed by said Jas. E. Freeman, U. S. Surveyor, and sworn to before me, a U. S. Commr. in and for the County of San Francisco in the State of California, this 29th day of Aug., 1877.

J. A. ROBINSON,
U. S. Commissioner.

U. S. Surveyor General's Office,
San Francisco, Cal., Aug. 6, 1879.

I hereby certify that the foregoing transcript has been correctly copied from the original field notes as the same remain of record and on file in this office.

Witness my hand and official seal the day and year in this certificate written.

THEO. WAGNER
U. S. Sur. Gen'l.

DEPARTMENT OF THE INTERIOR
General Land Office
Washington, D. C., December 5, 1929.

I hereby certify that the annexed copies are photographic copies of the papers they purport to represent on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] THOS. C. HAVELL,
Assistant Commissioner of the
General Land Office.

Washington, D. C.
July 5, 1879.

To the
Surveyor General of the United States for the
State of California.

Sir:—

It has lately came to the knowledge of the present owners of certain tule or swamp and overflowed land situate between the bays of Napa and San Pablo in Solano County, State of California, and adjacent to the island of Mare Island, (being the same property hereinafter referred to and described herein and in the papers hereto annexed) that the Government of the United States, through you, its proper representative, had lately surveyed said land to the United States, claiming the same as included

in the purchase by it of the said island from George W. Bissell et al in the year 1852.

The particular tule or swamp and overflowed land referred to is that described in the survey made by H. Patten, surveyor of said Solano County on the 11th and 12th of June 1855, (a copy of which is hereto annexed) and in the Letters Patent (copy also annexed), of the State of California to one David N. Darlington, issued under the seal of said State on March 18th, 1857; the title to such swamp and overflowed land having previously become vested in said State under and by virtue of the Act of Congress approved September 28th, 1850, known as the Swamp and Overflowed Land Act.

In consideration, therefore, of the premises, I, Bernard T. Hanley, attorney for the said present owners and acting herein by their direct authority, do solemnly protest against said survey of said property to the United States, (the same being already legally vested in them, the said owners) and against the signing and confirmation thereof; and while hereby entering, in behalf of said owners their said protest, I also, for and in their behalf, respectfully request that if, notwithstanding protest, you should sign said survey and forward same to the General Land Office or other proper office in Washington, you should at the same time, or as soon thereafter as practicable, forward this protest to the same office as well as the copy of Letters Patent and Survey herewith enclosed and referred to.

And, acting as aforesaid, I do further protest against said survey in so far as it includes certain additional tule or swamp and overflowed lands located adjacent to said Mare Island under authority of said Act of Congress and of certain school land warrants of the State of California. As will appear by reference to certificate of location filed in the office of the County Clerk of Solano County November 17, 1854 and recorded in Book No. 1, pages 114 and 115.

Very respectfully
BERNARD T. HANLEY
Atty. for Owners.

United States of America—
State of California.

To all to whom these presents shall come, Greeting,

Whereas, under the provisions of an Act of Congress of the United States approved the 28th day of September, A. D. 1850 entitled "An Act to enable the State of Arkansas and other States to reclaim swamp lands within their limits," in which act the manner of selecting and setting apart swamp and overflowed lands, are fully set forth, and whereas, in accordance with the provisions of the Act of Congress, the title of which is above recited, the Legislature of the State of California on the 28th day of April, A. D. 1855, passed an act entitled "An Act to provide for the sale of the swamp and overflowed lands belonging to the State" which Act authorized the location and disposal of a portion of the overflowed lands donated to the State of

California by the Act of Congress the title of which is above recited.

And Whereas it appears by the Certificate of the Secretary of State bearing date the 18th day of March A. D. 1857, that he has been duly notified by the Treasurer of the State of California that David N. Darlinton has paid $164.55 to the Treasurer of Solano County, State of California, in full payment for 164.55 acres of Swamp and overflowed lands situated in said Solano County and described in the county records of said county as follows, to wit: The south fractional half of the southeast quarter of Section No. Ten, the North-East fractional portion of the North-East quarter of Section No. 15, the South-West fractional portion of the South-West quarter of Section No. 14, and the North East fractional portion of the South-West quarter of Section 14, the whole lying between San Pablo and Napa bays in said County of Solano and being in Township Number three north Range four west of Monte Diablo meridian and base and conforming to the U. S. Government survey.

Now therefore all the requirements of the Act of Congress as well as the Act of the State Legislature in relation to swamp and overflowed lands having been fully complied with he the said David N. Darlinton has become entitled to a patent from the State of California for the tract or parcel of swamp or overflowed lands above described; and there is hereby granted by the State of California to the said David N. Darlinton and to his heirs and assigns forever the said described tract or par-

cel of swamp and overflowed lands with the appurtenances; the said David N. Darlington, his heirs and assigns to have and to hold forever the said described tract or parcel of land with all the rights, privileges and appurtenances unto the same belonging or in any way appertaining.

In Testimony Whereof I, J. Neely Johnson, Governor of the State of California have caused these letters to be made patent and the seal of the State of California to be hereunto affixed.

Given under my hand at the City of Sacramento this the 18th day of March in the year of Our Lord A. D. 1857.

(Sig'd) J. NEELY JOHNSON

[Seal of State]

Attest

DAVID F. DOUGLASS,
Secretary of State.

Copy

Survey for David N. Darlinton

Fractional S. E. qr. of Sec. 10—Fractional S. W. qr. of Sec. 11—Fractional N. W. qr. of Sec. 14—Fractional S. W. qr. of Sec. 14—and Fractional N. E. qr. of Sec. 15 of Township 3, N. Range 4 W. of Mount Diablo Meridian.

Began at qr. Sec. corner on E. line of Sec. 25, T. 4 N. R. 4 W. and run S. varn. 60°, 270.00 chains. Thence run W. 50.00 chains; From this point the target on the Island bore S. 67°, 20′ W.; thence run S. 40.00 chains, from which point target bore W.; thence run W. 20.60 chains to shore of Napa

Bay—distance from this point to target 73.75 chains.

Thence beginning at the point on Mare Island where the upland terminates and the swamp or tule land begins on the shore of San Pablo bay and run N. 34° W. 23.50 chains to the target—thence N. 46° W. along the shore of San Pablo Bay 39.20 chains; thence N. 52° W. along the same shore 26.50 chains; thence N. 56° W. 7.00 chains; thence N. 22.55 chains; thence E. 21.53 chains to Napa Bay; thence South-Eastwardly along the shore of Napa Bay to the upland and thence with the sinuosities of the upland to the place of beginning. Which will more fully appear by reference to the foregoing map.

Surveyed June 11th and 12th, 1855.

(Sigd) H. PATTON,
County Surveyor
Solano County.

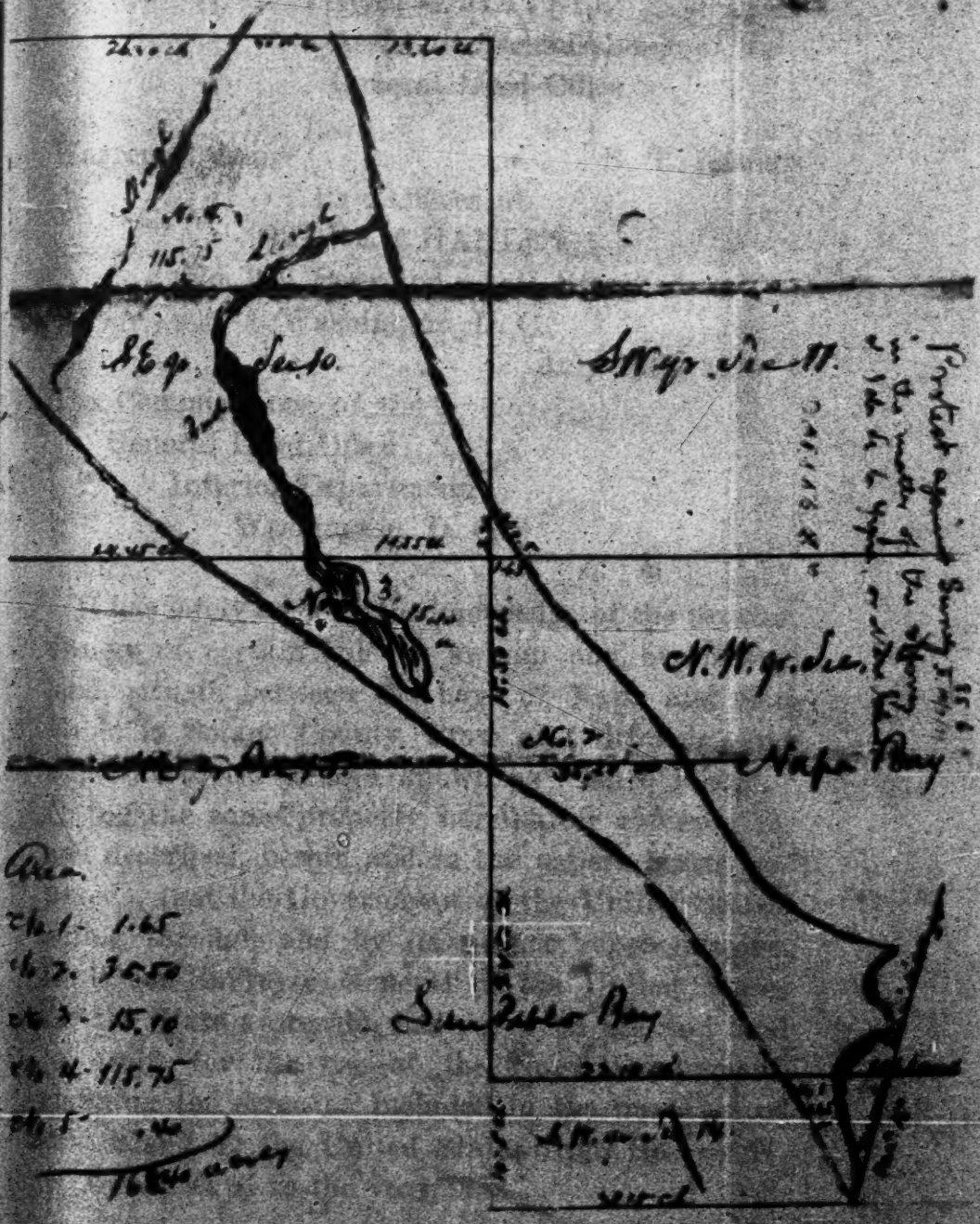
United States
DEPARTMENT OF THE INTERIOR
General Land Office
Washington

December 5, 1929.

I hereby certify that the annexed copy of protest, dated July 16, 1879, is a true and literal exemplification of the original on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this

F-6



office to be affixed, at the city of Washington, on the day and year above written.

THOS. C. HAVELL
Assistant Commissioner of the
General Land Office.

Warren C. Stone B. T. Hanley

Law Offices of
STONE & HANLEY,
No. 319 Four-and-a-half Street.
Washington, D. C.,

July 16th, 1879

The Commissioner of the
General Land Office
Interior Department,
Washington, D. C.

Sir:

It has lately come to the knowledge of the present owners of certain tule or swamp and overflowed land, situate between the bays of Napa and San Pablo in Solano County, State of California, and adjacent to the Island known as "Mare Island," (being the same property hereinafter referred to, and described, herein and in the papers hereto annexed), that the Government of the United States, acting through and by its proper representative, towit the Surveyor General of the United States for the State aforesaid, had surveyed the said land to itself, for the use of the Navy Department, claiming the same as included in the purchase of said island by the United States from George W. P. Bissell et al in the year 1853.

The particular tule or swamp and overflowed land referred to is that described in the survey made by H. Patton, Surveyor of said Solano County on the 11th and 12th days of June A. D. 1855, (a copy of which survey is hereto annexed), and in the Letters Patent of the State of California, issued under the seal of said State March 18th A. D. 1857, (copy also annexed), the title to such swamp and overflowed land having previously become vested in the State under and by virtue of the Act of Congress approved September 28th, 1850, known as the Swamp and Overflowed Land Act.

In consideration, therefore, of the foregoing, I, as attorney for the said present owners and acting herein by their direct authority, do formally protest against said survey and the consideration or confirmation thereof by you or other proper officer of any Department or Bureau of the Government of the United States, and in protesting request that if testimony be necessary the Commission to take the same may issue at the earliest practicable date.

And acting as aforesaid, I do further protest against said survey in so far as the same includes other tule land, located in like manner adjacent to Mare Island, aforesaid, under authority of an Act of Congress passed May 3, 1852, and of certain school land warrants of the State of California, numbered 151 and 274, reference being had to the certificate of location filed in the office of the County Clerk of said Solano County November 17, 1854 and recorded in Book No. 1, pages 114 and 115.

Very respectfully,

B. T. HANLEY

Atty. for the Owners.

DEPARTMENT OF THE INTERIOR
General Land Office
Washington, D. C., December 5, 1929.

I hereby certify that the annexed copies are photographic copies of the papers they purport to represent on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] THOS. C. HAVELL
Assistant Commissioner of the
General Land Office.

[Copy]

Survey for David N. Darlinton

Fractional S. E. qr. of Sec. 10—Fractional S. W. qr. of Sec. 11—Fractional N. W. qr. of Sec. 14—Fractional S. W. qr. of Sec. 14 and Fractional N. E. qr. of Sec. 15 of Township 3 N. Range 4 W. of Mount Diablo Meridian.

Began at qr. Sec. corner on E. line of Sec. 25, T. 4 N. R. 4 W. and run S. varn. 16°, 270.00 chains; thence run W. 50.00 chains; from this point the target on the Island bore S. 67° 20′ W.; thence run S. 40.00 chains, from which point target bore W. thence run W. 20.60 chains to shore of Napa bay; distance from this point to target 73.75 chains.

Thence beginning at the point on Mare Island where the upland terminates and the swamp or tule land begins on the shore of San Pablo bay and run N. 34° W. 23.50 chains to the target—thence N. 46° W. along the shore of San Pablo bay 39.20 chains—thence N. 52° W. along the same shore 26.50 chains—thence N. 56° W. 7.00 chains—thence N. 22.55 chains—thence E. 21.53 chains to Napa bay—thence Southeastwardly along the shore of Napa bay to the upland, and thence with the sinuosities of the upland to the place of beginning, which will more fully appear by reference to the foregoing map.

Surveyed June 11th and 12th, 1855.

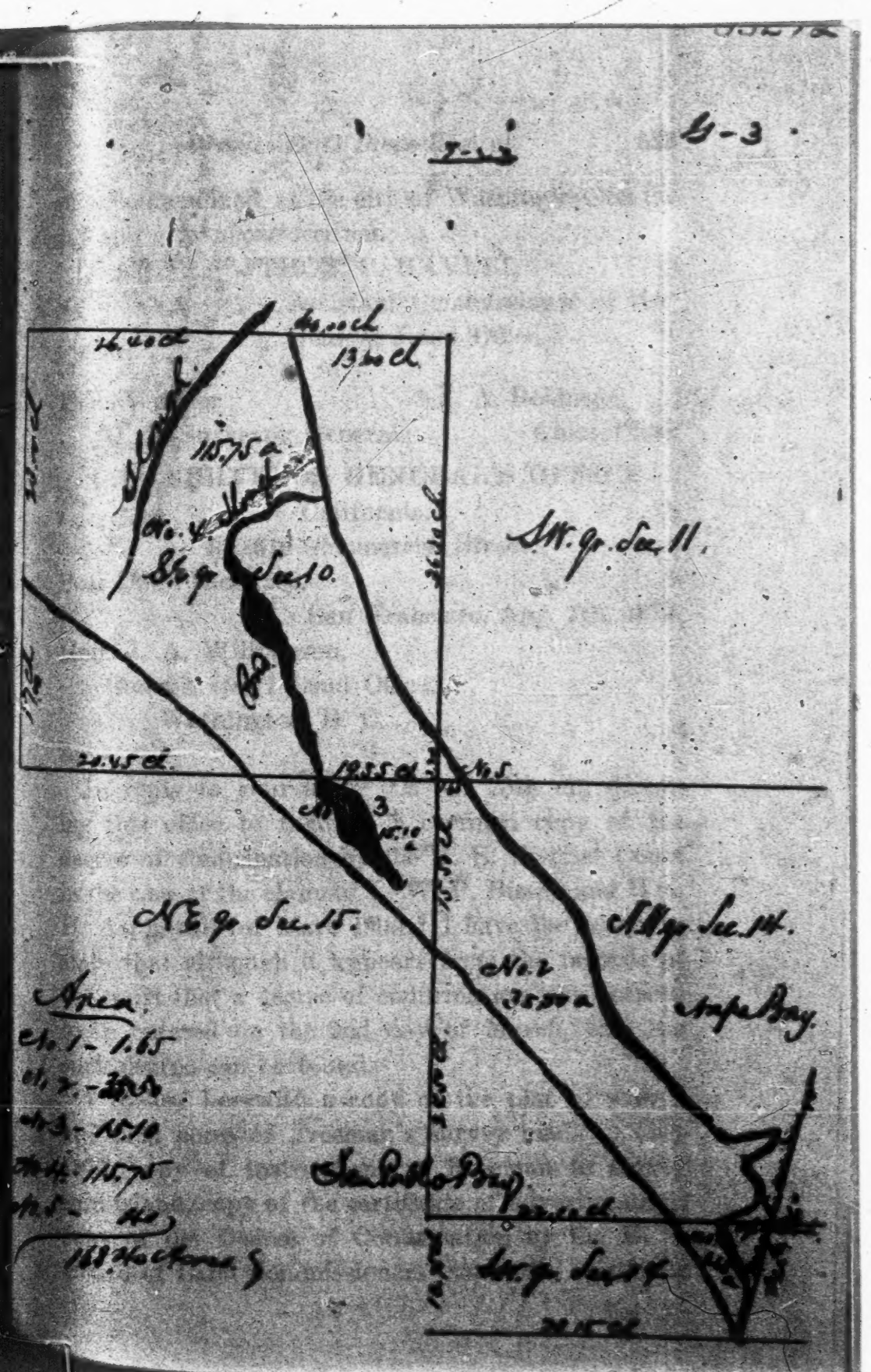
H. PATTON,
County Surveyor,
Solano County.

United States
DEPARTMENT OF THE INTERIOR
General Land Office
Washington

December 4, 1929.

I hereby certify that the annexed copy of letter, dated August 7, 1879, is a true and literal exemplification of the original on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this



G-3
26.40 ch
40.00 ch
13.60 ch
115.75 a
No. 4
S.E. gr. Sec. 10.
S.W. gr. Sec. 11.
20.45 ch
19.55 ch
No. 5
No. 3
15.10 a
N.E. gr. Sec. 15.
N.W. gr. Sec. 14.
No. 2
35.50 a
Arape Bay
Area
No. 1 - 1.65
No. 2 - 35.50
No. 3 - 15.10
No. 4 - 115.75
No. 5 - 40
168.40 Acres
S.W. gr. Sec. 14

office to be affixed, at the city of Washington, on the day and year above written.

[Seal] THOS. C. HAVELL
Assistant Commissioner of the
General Land Office.

Theo. Wagner — U. S. Surveyor General
J. A. Robinson, — Chief Clerk

U. S. SURVEYOR GENERAL'S OFFICE
California.
No. 610 Commercial Street
Post Office Box 2260.

San Francisco, Aug. 7th, 1879.

Hon. J. A. Williamson,
Commr. Gen'l Land Office,
Washington, D. C.

Sir—

In reply to your letter "E" of 25th ult. directing this office to forward a certified copy of the decree of confirmation by the U. S. District Court in the case of the claim of G. W. P. Bissell and Wm. H. Aspinwall for Mare Island I have the honor to state that although it appears from the records of the court that a decree of confirmation was ordered to be entered on the 2nd day of March, 1857, no such decree can be found.

I inclose herewith a copy of the plat of survey and field notes of Freeman's survey made in July 1877, copy of instructions to Freeman to survey said island, copy of the certificate of advertisement; copy of the Decree of Confirmation by the U. S. Board of Land Commissioners; copy of a certificate

from the Clerk of the U. S. District Court with extracts from the minutes in the case;
and

A Protest filed in this office July 14, 1879 by Bernard T. Hanley, Esq., of Washington City as attorney for owners.

I consider the survey incorrect in that it not only includes tracts which are properly islands in themselves but also embraces a large quantity of tide land, and should be limited to the area contained south of a line run across the island from the vicinity of Station No. 54 to Station No. 138.

Very respectfully
Your obdt. Srv't,
THEO WAGNER
U. S. Sur. Gen'l.

No. 38856
THEO WAGNER,
U. S. Surveyor-General for California
Date, Aug. 7, 1879

Subject: Transmitting copy Plat of Survey and Freeman's field notes of survey of "Mare Island." Also certificate of advertisement etc. and states reasons for disapproving survey.

See letter from the Secretary of the Navy, dated Aug't 4, 1879.

See to Secy Int. Sept. 22, 1905 relative to making further survey under direction of G. L. O.

See 1343798

Referred to Division E

Received (G.L.O.) Aug. 18 1879. 8 Papers.

We offer in evidence report of W. J. Lightfoot, a United States Surveyor, dated January 6, 1915.

(The document was received in evidence, marked "Plaintiff's Exhibit T".)

PLAINTIFF'S EXHIBIT T.

[Endorsed]: Filed Aug. 11, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
PUBLIC SURVEY OFFICE,
San Francisco, California,
August 5, 1931.

I, Frank E. Barker, Office Cadastral Engineer, do hereby certify that the annexed is a copy of the report of examination and investigation of alleged swamp and overflowed land and report of extent of Mare Island in Townships 3 and 4 North, Range 4 West, Mount Diablo Meridian, executed by W. J. Lightfoot, U. S. Surveyor, under instructions dated January 6, 1915, the original of which is on file in this office.

[Seal] FRANK E. BARKER
Office Cadastral Engineer.

(U. S. Surveyor General's Office. Oct. 11, 1915. San Francisco, Cal.)

FIELD NOTES
of the
Examination and investigation of alleged "Swamp and Overflowed" land and Report on extent of Mare Island, in Townships 3 and 4 North, Range 4 West, of the Mount Diablo Base and Meridian, in the State of California,

EXECUTED BY
W. J. Lightfoot.

In the capacity of U. S. Surveyor, under instructions dated Jan. 6, 1915, issued by the United States Surveyor General to govern surveys included in investigations, which were approved by the Commissioner of the General Land Office, Feb. 15, 1915.

Examination commenced Aug. 2, 1915.

Examination completed Aug. 9, 1915.

GENERAL REPORT.

Rendered under special instructions dated January 6, 1915, for an examination and investigation of alleged swamp and overflowed lands in Tps. 3 and 4 N., R. 4 W., M. D. M.

I have made a thorough examination and investigation of the region of these townships with regard to the character of the land lying between the navigable channels and the patented private claims.

From my personal inspection of these lands embraced in the said application of the State of California by its State Surveyor General for certification to it of all the swamp and overflowed lands returned as such on plats of Tps. 3 and 4 N., R. 4 W.,

M. D. M., approved March 4, 1863, as provided by Sec. 4 of an Act of Congress approved July 23, 1866, they are, at the present time, "swamp and over-flowed" lands as designated in the Act of Congress described as the swamp land act, dated Sept. 28, 1850. The land in the above townships lying between the navigable channels and the patented private claims, is "swamp and overflowed" land as designated in the said Act, because it is rendered swampy and unfit for cultivation by the presence of water thereon above ordinary high tides, which land by the existence of such swampy condition is rendered unfit for the growth of the ordinary crops of the locality in which the said land is found, without the reclamation of the same by means of diking and drainage.

The cause which makes the land too wet for cultivation is drainage from adjoining upland, extreme high tides and a near surface underflow. Levees have been built in each township near the line of ordinary high tide.

These levees built by private parties, consist of an earth bank about ten feet wide on top, with a slope of 2 to 1, and for the greater part of their length do not exceed about 4 feet in height. The levees on the west side of Napa Creek, on Mare Island and on Island No. 2, were built about 30 years ago. The levees on the east side of Napa Creek were built 1 or 2 years ago.

These lands in each township are intersected by navigable creeks and sloughs. All of these lands are

"swamp and overflowed lands" (See statement showing estimate of area)

To determine the condition of the lands in Tps. 3 and 4 N., R. 4 W., M. D. M., at the time of the Grant, I have secured evidence from residents in the locality who were familiar with the character of the lands at an early date, as follows:

Affidavit of Thomas V. Dixon, who has known the land since 1853.

Affidavit of P. M. G. Vallejo, who has known the land since 1850.

I have also secured the affidavit of Justice J. A. Browne in regard to the character and standing in the community of the above affiants.

All the information obtained from the above named affiants indicates that the land embraced in the said application of the State of California by its State Surveyor General, was, when they first became acquainted with it, "swamp and overflowed" land, as designated in the Act of Congress described as the swamp land act, approved Sept. 28, 1850.

W. J. LIGHTFOOT,
U. S. Surveyor.

GENERAL REPORT.

Examination to determine the extent of Mare Island.

I made a thorough examination of all the lands lying in Tps. 3 and 4 N., Rs. 4 W., M. D. M., for the purpose of determining the exact lands forming or appurtenant to what is known as Mare Island. I drove in a buggy from the Engineering buildings at the Navy Yard, in a northwesterly direction about five miles on dry land, and found that the "swamp

and overflowed" land extends about two and a half miles into Tps. 3 and 4 N., R. 5 W., M. D. M. That portion of the "swamp and overflowed" land which is a part of Mare Island is indicated on the attached sketch in red. This land has been partly reclaimed by levees which are not in very good condition at the present time. None of this land is used by the U. S. Navy Department in any way, but it is used by private parties for pasture and hay land. There are three or four ranch houses, with out buildings in a dilapidated condition, on the island.

In Vol. 212, page 766 of the Federal Reports, Judge Van Fleet, in the case of E. H. Sawyer vs. Osterhaus, is quoted as follows:

> "The land is physically a part of the body of land officially known and designated, as 'Mare Island', now and for many years, a Government Reservation as a naval station, which lies in a northerly arm of the Bay of San Francisco, technically known as San Pablo Bay. Historically speaking, and as depicted on the maps of the State, Mare Island was apparently at one time a territory comprising several thousand acres. As thus shown, its southerly projection, resting in San Pablo Bay, consists of a compact body of high land bearing a general resemblance to the low hill or rolling land found on the adjacent main land, from which higher part, or head, there extends to the northwest a low narrow neck or strip, connecting it with a much larger body of low, swampy land, spreading out fanlike for several miles in the same general

direction. This body of land as thus described was bounded by San Pablo Bay on the south and west; by Mare Island Straits and Napa Bay on the east; and Sonoma Creek on the north, all navigable. At the date of the reservation of the island as a Naval base this entire territory was supposed to be embraced within its limits, and the evidence tends to show that during the early years of its occupancy, steps were taken by the Government Authorities, looking to the assertion of dominion over the whole of this area for such purpose."

Mr. James Lane, a Government Employee at the Navy Yard has known this land since 1866. He states that the land is only overflowed by extraordinary high tides. In early days wood was scarce on the island and it was necessary to haul driftwood from the northwestern part of the island along the beach. Just north of the present steam engineering building at the Navy Yard, there was a strip of land about 20 or 30 feet in width that was dry at all times, except when covered by extreme high tides. He drove across this strip while hauling wood.

Mr. Thomas V. Dixon, a resident of this vicinity, has known this land since 1853. He followed hunting and boating and was familiar with the conditions as they were then. He states that the land back of the steam engineering building at the Navy Yard, was overflowed by high tides and that he has crossed the same many times in a small boat. There

was a neck of land extending from back of the present steam engineering building at the Navy Yard, north to a slough, and in the center of this land, was quite a large pond at low tide, with a narrow strip of land on each side. He often pulled his boat over this small strip of land (about 20 feet) into the pond, rowed across the pond and then pulled his boat out and across the narrow strip of land into San Pablo Bay. He was employed by the Government on a survey of the tule land north of the Navy Yard, taking a small sloop along, aboard of which the surveying party slept and ate. He hunted ducks with Admiral Farragut and other officers of the Yard.

At the present time, this narrow strip of land, has been made several hundred feet in width, by dredging.

In Vol. 28, page 714 of the Federal Reports, Judge Field, in the case of San Francisco Savings Union et al, vs. Irwin, is quoted as follows:

> "From the date of that conveyance (made to the U. S. Jan. 4, 1853) the United States has been in possession of the island and has constructed there large and expensive buildings for the uses of the Navy including a Navy Yard. They have also occasionally asserted ownership over the adjacent overflowed lands, but the acts done by them, were not of a character to indicate any settled purpose of occupancy of the lands or of devoting them to any public uses. They have not constructed any levees

to prevent their overflow or made any efforts to reclaim the lands or to subject them to any uses of the Government. Two shanties 10 x 12 feet were erected in 1874 or 1875 on the lands nearly eight miles from the island, but were soon abandoned, and no other buildings have been erected on them. It is plain that the acts which the United States are said to have done to mark their control of the overflowed lands if done by a private party would not bar the plaintiffs from asserting their right of possession."

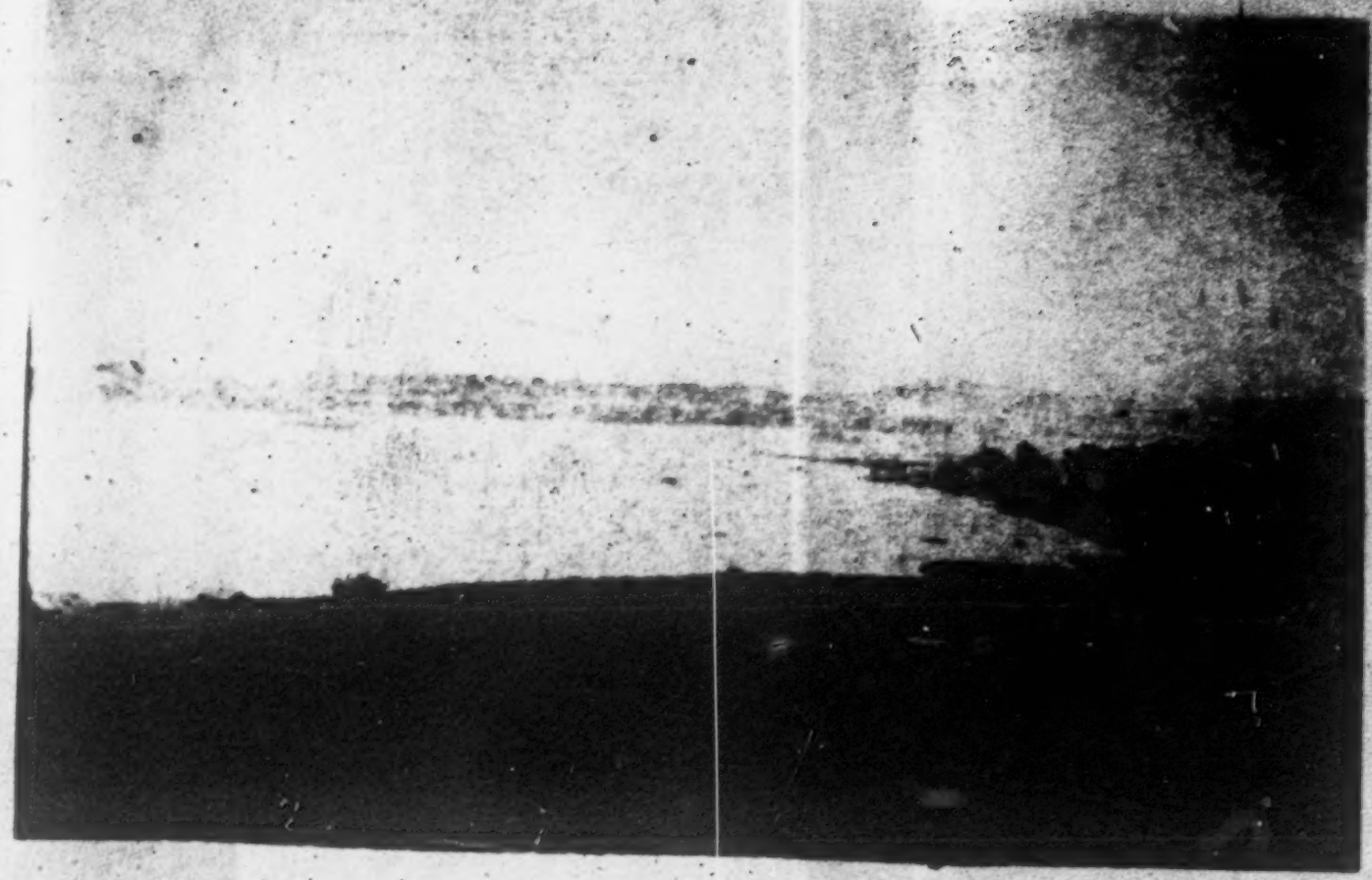
All "swamp and overflowed" land in the State of California passed to the State under the Act of Sept. 28, 1850. The date on which Mare Island was conveyed to the United States for uses of the Navy, is Jan. 4, 1853. It might be inferred from this that the "swamp and overflowed" land was not conveyed to the United States.

The results of my personal examination leads me to the conclusion that the "swamp and over flowed" land indicated on the attached sketch in red, is physically a part of the body of land known and designated as Mare Island. It is not at this time nor has it been at any time separated from the compact body of high land on which the Navy Yard is located. The Government is now in possession of and is using all of the "swamp and overflowed" land lying southeast of the line on the attached sketch, marked A-B. This strip of land extends about one mile in a southeast direction, from

the line marked A-B, and is all northwest of the narrow neck of land which connects the "swamp and overflowed" land to the high land. If the United States by the conveyance, dated Jan. 4, 1853, acquired title to any of the "Swamp and overflowed" land, northwest of this narrow neck of land, it certainly acquired title to all that body of "swamp and overflowed" land shown on the attached sketch in red.

W. J. LIGHTFOOT,
U. S. Surveyor.

PICTURE NO.1.



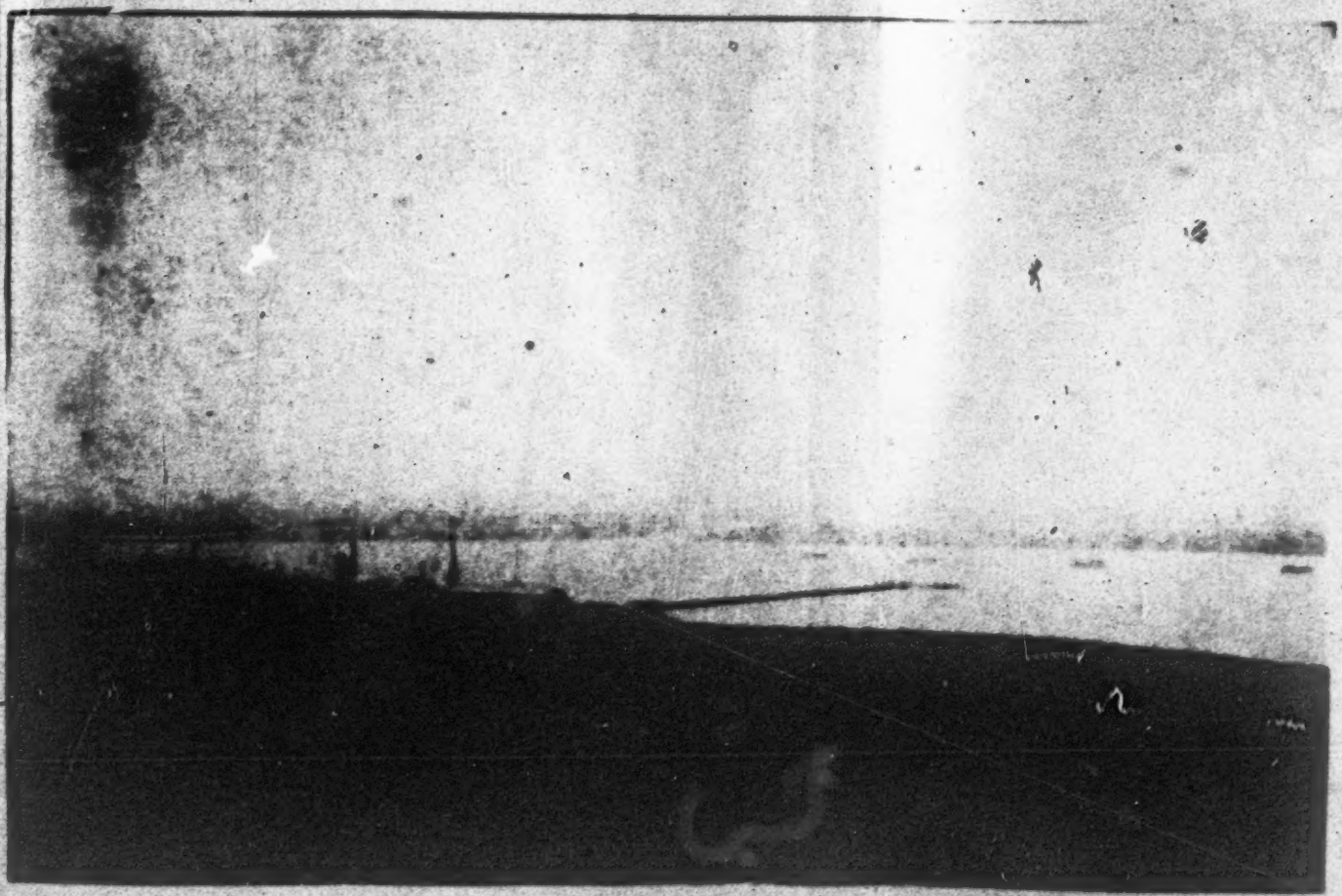
A--MARE ISLAND NAVY YARD.

B--STEAM ENGINEERING BUILDINGS.

C--PART OF THE CITY OF VALLEJO.

This picture was taken from Vallejo Heights looking south toward Mare Island.

PICTURE NO.5.



A.-- DUTCHMAN'S SLOUGH.

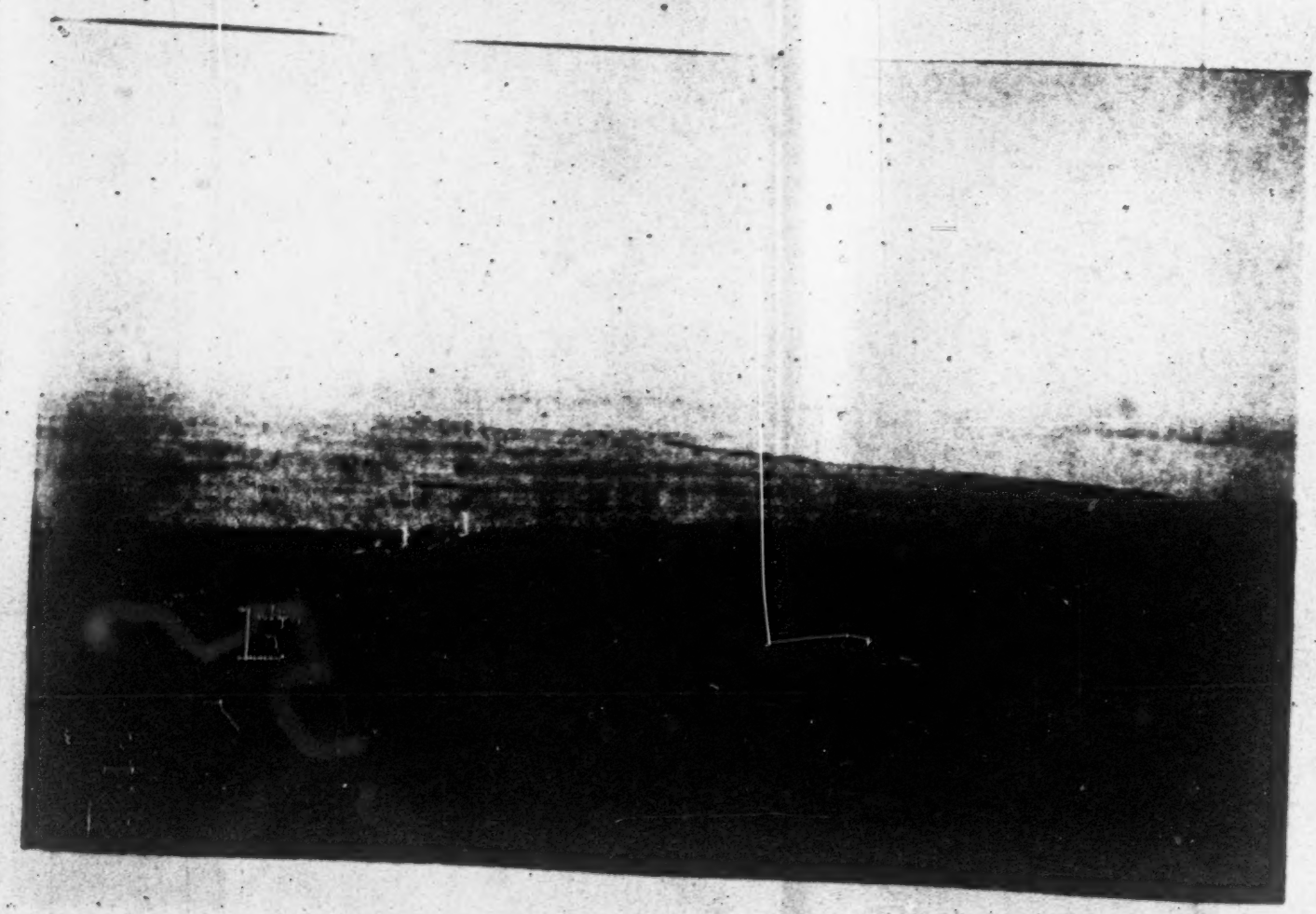
B.-- BRICK WORKS.

C.-- NAPA CREEK.

D.-- SWAMP AND OVERFLOWED LAND NORTH OF MARE ISLAND.

This picture was taken from Vallejo Heights looking west across Napa Creek.

PICTURE NO.5.



A.-- SLAUGHTER HOUSE POINT.

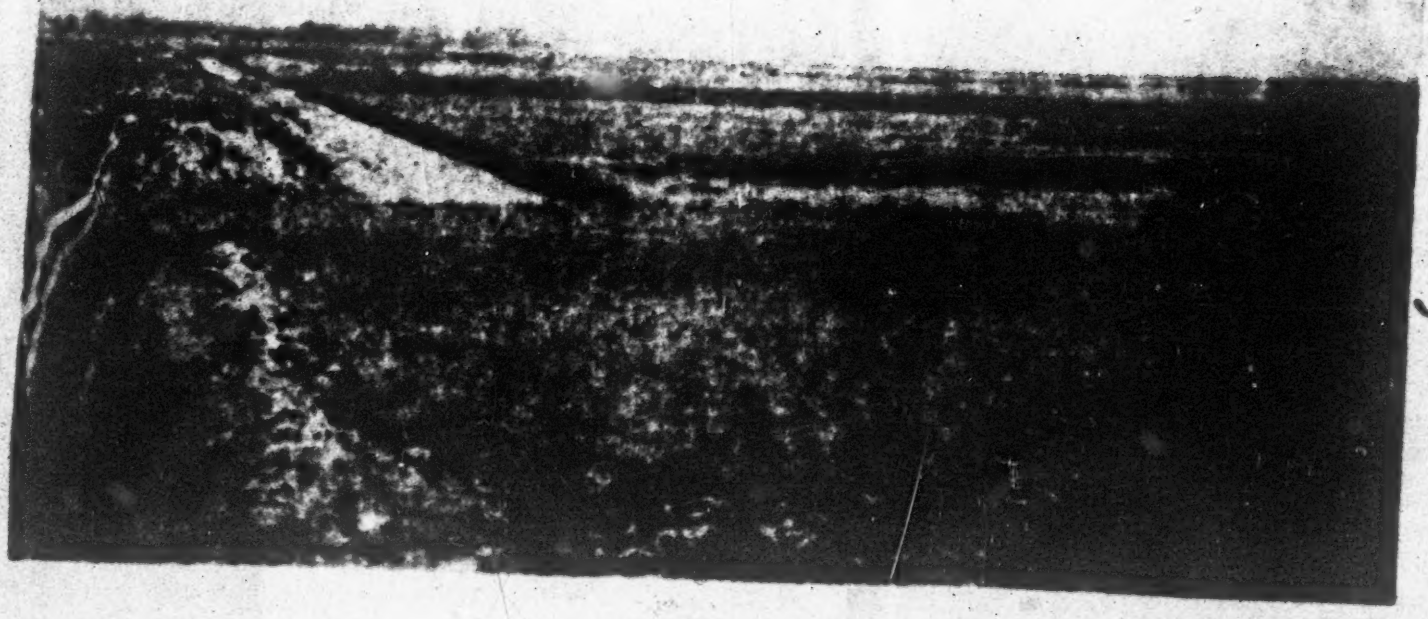
B.-- LEVEE.

C.--.RANCH HOUSE ON SWAMP AND OVERFLOWED LAND.

D.-- LEVEE.(PICTURE NO.6 WAS TAKEN FROM THIS POINT).

This picture was taken from Vallejo Heights looking north west.

PICTURE NO.4.



A.-- DRAINAGE DITCH. (THIS IS THE SAME DITCH SHOWN IN PICTURE NO.5.)

B.-- HAY FIELD.

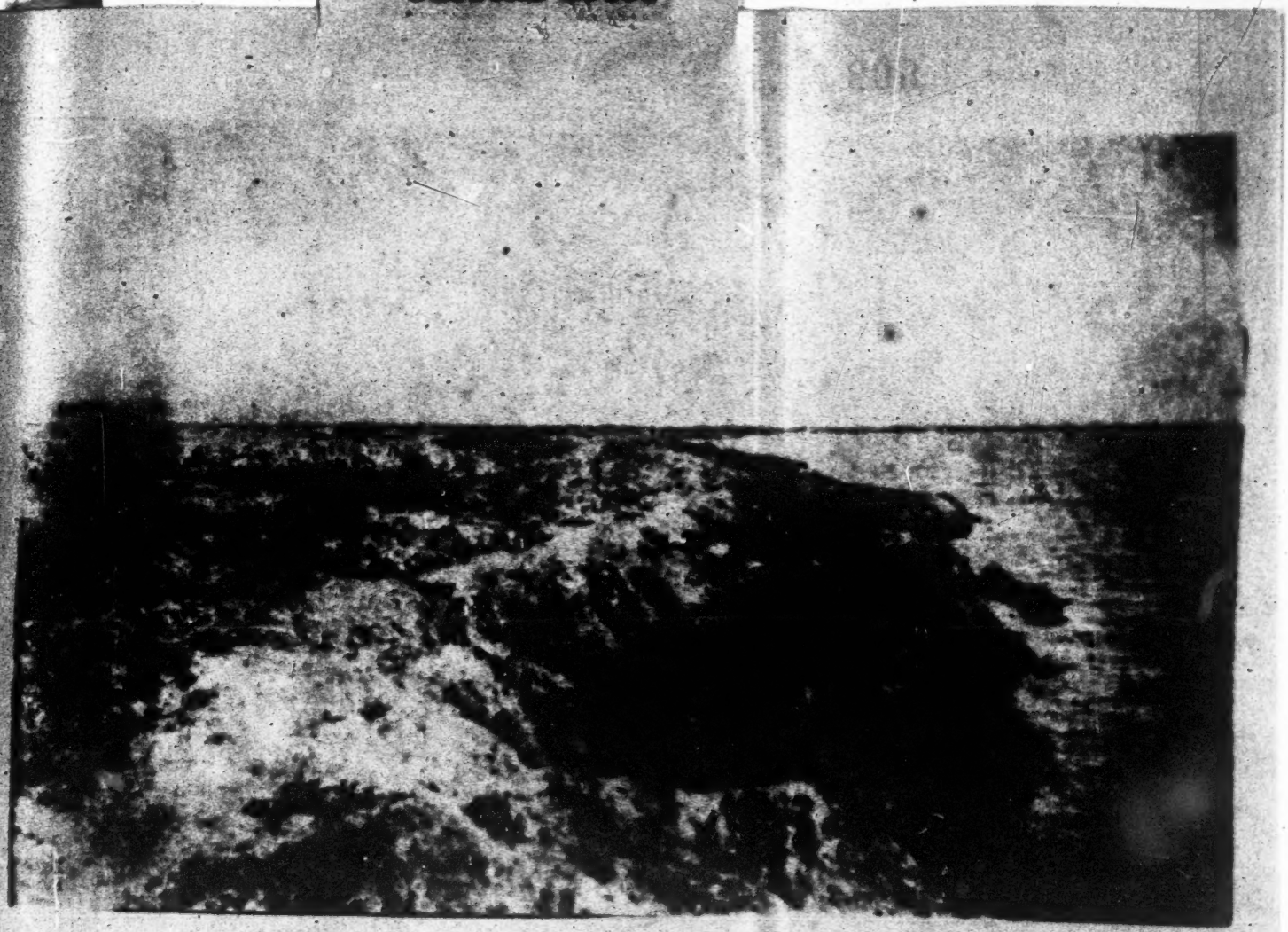
This picture was taken about 10.00 chains east of the ranch house shown in picture No.3, and was looking north across the swamp and overflowed land in sec.1 and 2, T. 3 N., R. 4 W., M.D.M.

PICTURE NO.5.

A.-- RANCH HOUSE SHOWN AT "C" IN PICTURE NO.3.

This picture was taken at point "A" in picture No.4 and shows a drainage ditch which drains west into Napa Creek at point "A" in picture No.6.

PICTURE NO.6.



A.-- POINT WHERE DRAINAGE DITCH SHOWN IN PICTURE NO.5, EMPTIES INTO NAPA CREEK.

B.-- LEVEE.

This picture was taken at point D. shown in picture No.3, and is looking north.

Estimate of

Swamp and Overflowed land in Tps. 3 and 4 N., R. 4 W, M. D. M.

In T. 3 N., R. 4 W., M. D. M.

Section	In Mare Island Acres	Not in Mare Island Acres
1.		280.00
2.		160.00
3.	360.00	
4.	600.00	
5.	600.00	
6.	360.00	
8.	40.00	
9.	320.00	
10.	440.00	
11.		40.00
12.		280.00
15.	40.00	
Township Total	2760.00 A.	760.00 A.

In T. 4 N., R. 4 W., M. D. M.

2.	40.00
3.	600.00
4.	440.00
5.	120.00
7.	480.00
8.	360.00
9.	600.00
10.	400.00
15.	520.00
16.	360.00

Section	In Mare Island Acres	Not in Mare Island Acres
17.		400.00
18.		640.00
19.		640.00
20.		600.00
21.		200.00
22.		200.00
23.		280.00
26.		520.00
27.		280.00
28.		640.00
29.		520.00
30.	80.00	560.00
31.	600.00	40.00
32.	160.00	440.00
33.	120.00	440.00
34.		160.00
35.		200.00
Township Total	960.00 A.	10680.00 A.

Township	In Mare Island Acres	Not in Mare Island Acres
T. 3 N, R. 4 W, M. D. M.	2760.00	760.00
T. 4 N, R. 4 W, M. D. M.	960.00	10680.00
Total	3720.00 A.	11440.00 A.

In Mare Island.	3720.00 A.
Not in Mare Island.	11440.00 A.
Grand Total.	15160.00 A.

State of California,
County of Solano.—ss.

J. A. Browne being duly sworn deposes and says; I am now and have been Justice of the Peace in Vallejo, California, for a period of eight years. I know Thomas V. Dixon and Dr. P. M. G. Vallejo whose affidavits have been shown to me in reference to the character of the land situated in Townships 3 and 4 North, Range 4 West, Mount Diablo Base and Meridian, and claimed to be swamp and overflowed lands. The affiants heretofore named, are men of good character and standing in the community, whose statements under oath or otherwise are worthy of full faith and credence.

JNO. A. BROWNE,
Justice of the Peace.

Subscribed and sworn to before me this 9th day of August 1915.

[Seal] JAMES H. O'LEARY
Notary Public in and for the County of Solano.
My commission expires Feb. 4th, 1919.

In the Matter of the Ascertainment of the Character of the Lands in Townships 3 and 4 North, Range 4 West, M. D M. on Sept. 28, 1850.

AFFIDAVIT OF THOMAS V. DIXON.

State of California,
County of Solano.—ss.

Thomas V. Dixon, being first duly sworn, deposes and says; I am a resident of the County of

Solano; I have known the character of the land in Townships 3 and 4 North, Range 4 West, Mount Diablo Base and Meridian, constantly since the year 1853, and have been a resident of this County continuously since 1853; I became acquainted with the character of this land as it was then by reason of having been hunting over it, and by boating and hauling drift wood over it.

To the best of my knowledge and belief the land shown as "Swamp and Overflowed Land" on the attached sketch was "Swamp and Overflowed land" when I first knew it. The land is so swampy and overflowed during every planting, growing and harvesting season, as to be unfit for cultivation in any of the staple crops of this County, without the use of artificial means of reclamation. The land is made unfit for cultivation by being overflowed by extreme high tides which overflow the surface to considerable depth, and also by being saturated by a near surface underflow from the sea. The said lands are above ordinary high tides and can be reclaimed by the construction of levees and proper drainage.

THOS. V. DIXON

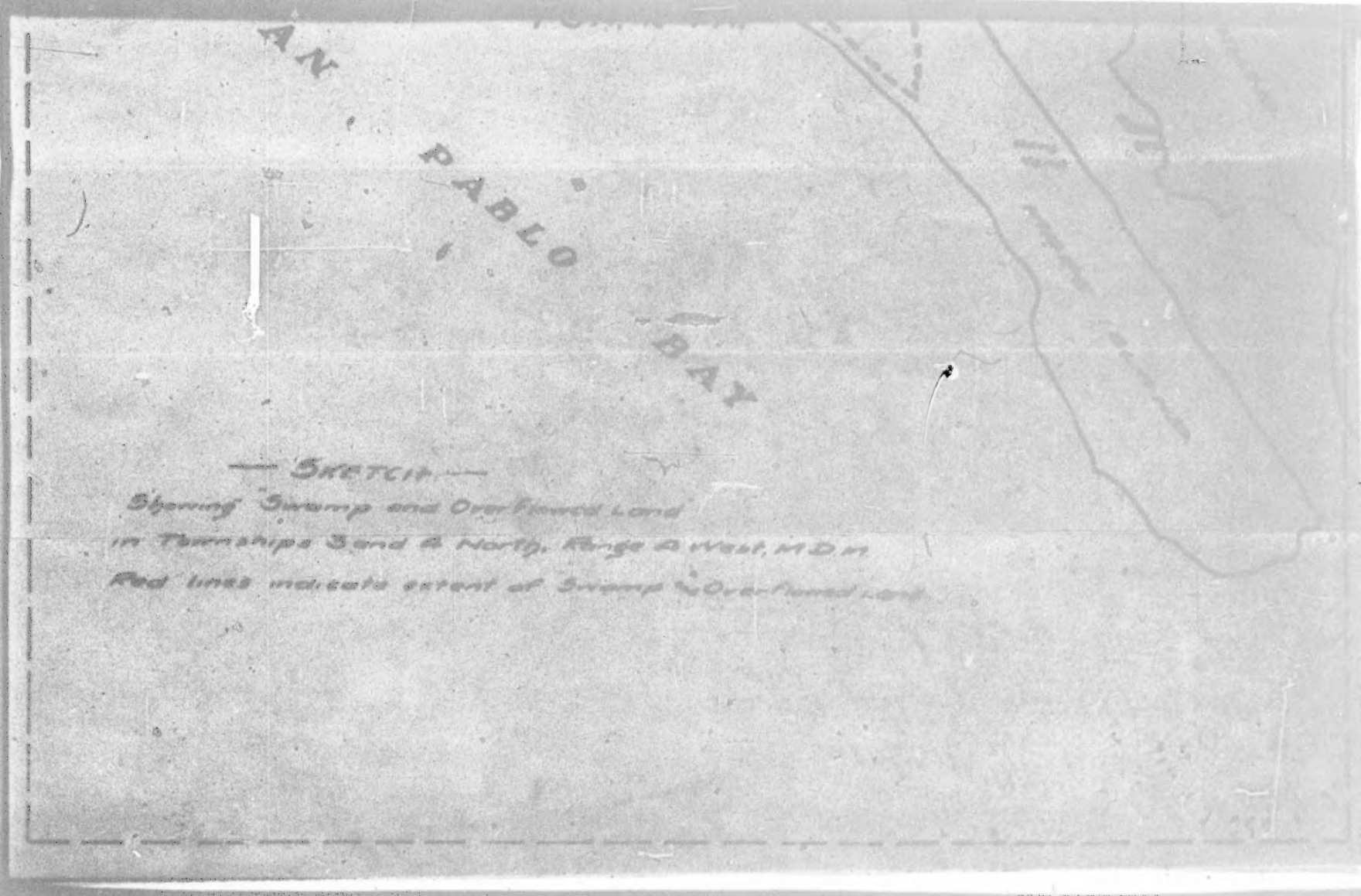
Subscribed and sworn before me on this 6th day of Aug. 1915.

[Seal] JAMES H. O'LEARY

Notary Public in and for the County of Solano.

My commission expires February 4th, 1919.

Overflow Land
Overflow Land
Overflow Land



— SKETCH —

Showing Swamp and Overflowed Land
in Townships 3 and 4 North, Range 2 West, M.D.M.
Red lines indicate extent of Swamp & Overflowed Land

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PAGE

In the Matter of the Ascertainment of the Character of the lands in Townships 3 and 4 North, Range 4 West, M. D. M. on Sept. 28, 1850.

AFFIDAVIT OF P. M. G. VALLEJO.

State of California,
County of Solanon.—ss.

P. M. G. Vallejo being first duly sworn deposes and says; I am a resident of the County of Solano; I have known the character of the land in Townships 3 and 4 North, Range 4 West, Mount Diablo Base and Meridian, constantly since the year 1850, and have been a resident of this County since 1850; I became acquainted with this land at is was then by reason of having hunted over it. The land in these townships belonged to my father who was General M. G. Vallejo.

To the best or my knowledge and belief, the land shown as "Swamp and overflowed land" on the attached sketch was "swamp and overflowed land" when I first knew it. The land is so swampy and overflowed, during every planting, growing and harvesting seasons, as to be unfit for cultivation in any of the staple crops of this County, without the use of artificial means of reclamation. The land is made unfit for cultivation by being overflowed by extreme high tides which overflow the surface to considerable depth, and also by being saturated by a near surface underflow from the sea. The said lands are above ordinary high tides and can be reclaimed by the construction of levees and proper drainage.

P. M. G. VALLEJO

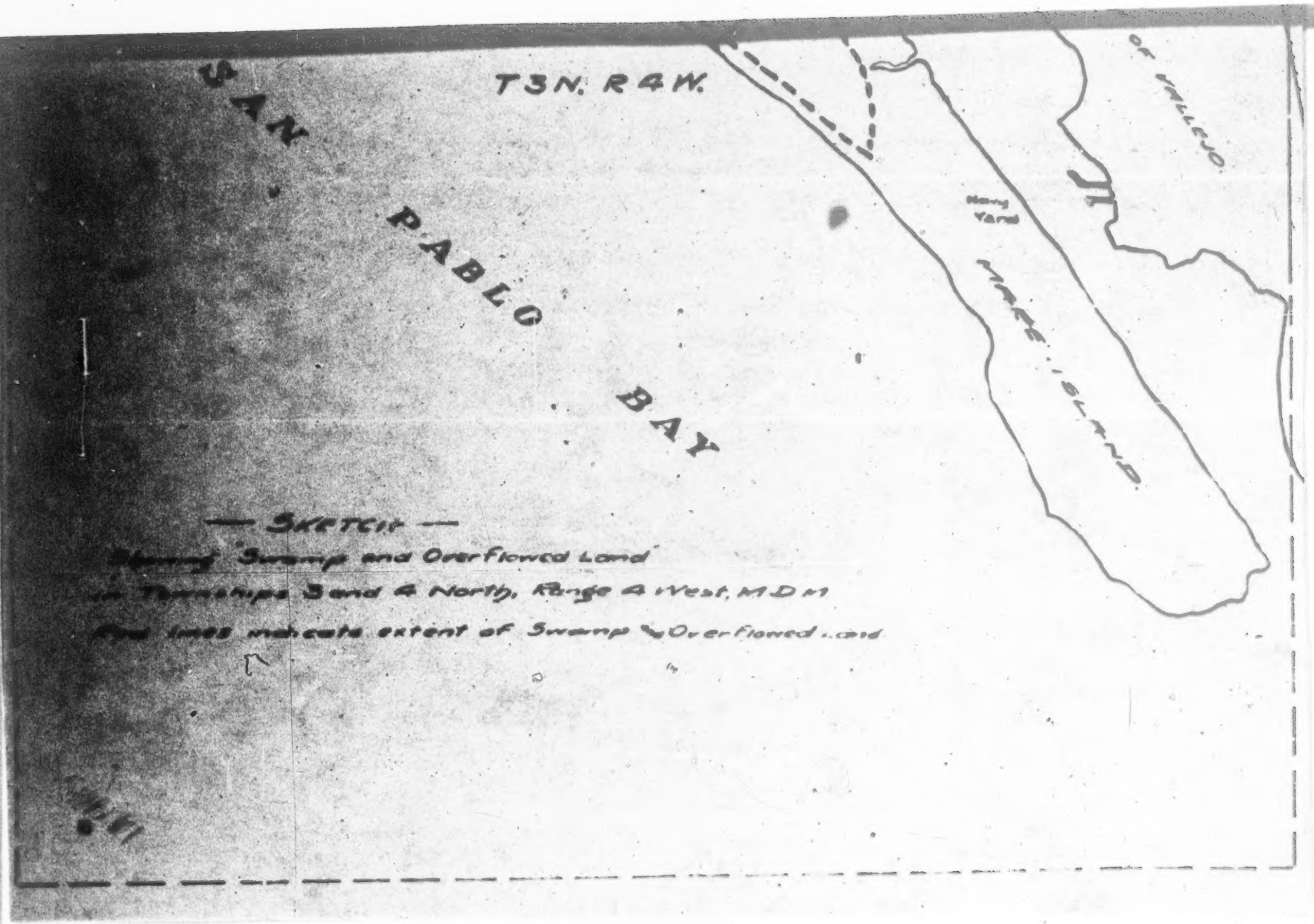
Subscribed and sworn to before me, this 7th day of Aug., 1915.

[Seal] OSCAR W. HILTON

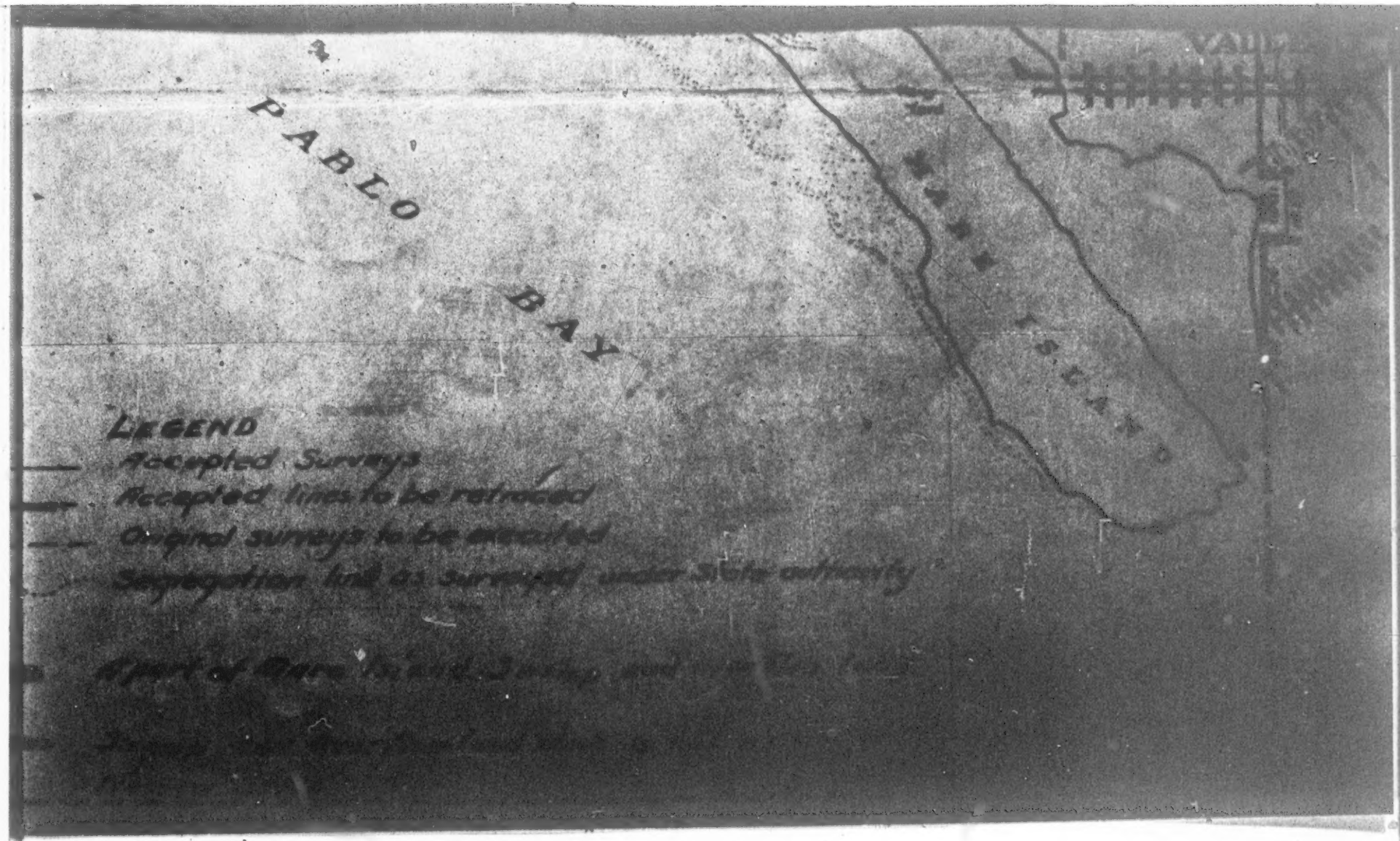
Notary Public in and for the County of Solano.

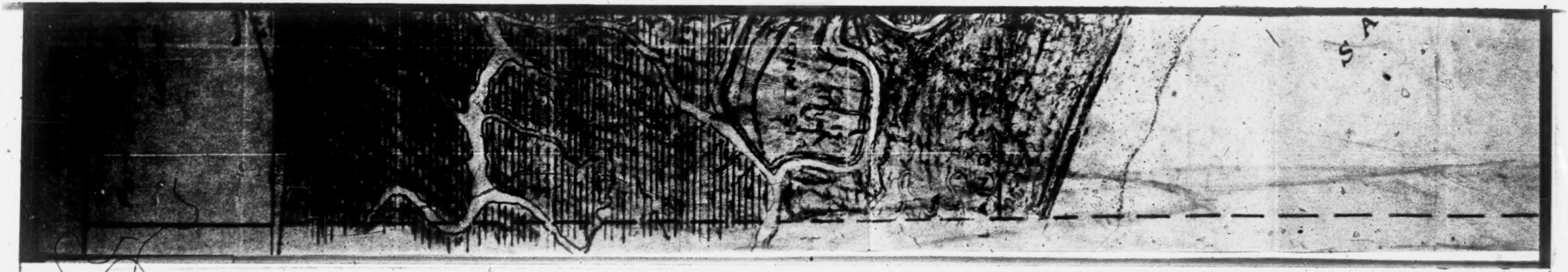
My commission expires July 22, 1916.

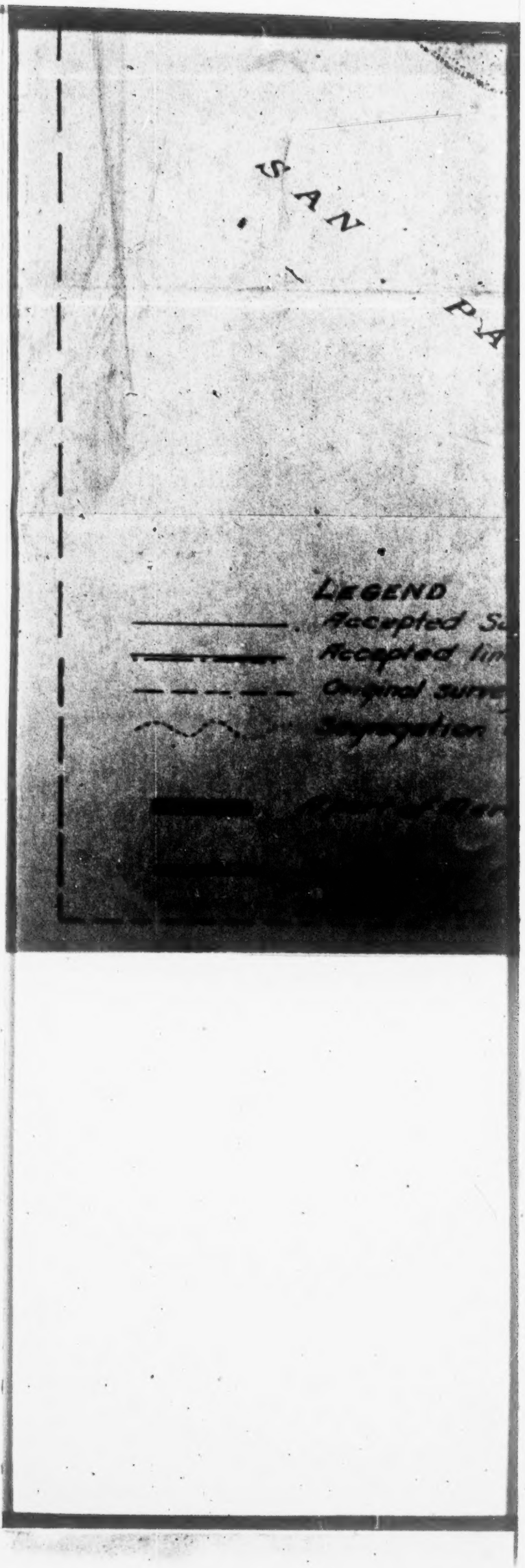
Sec 2
Sec 11
Sec 12
Sec 13
Sec 14
Sec 23
Sec 24
Sec 25
Sec 26
Sec 36
Sec 1
Swamp and Overflowed Land
Swamp and Overflowed Land
Swamp and Overflowed Land
Swamp and Overflowed Land
Swamp and Overflowed Land
Swamp and Overflowed Land
Swamp and Overflowed Land
Sand O Land
Sand O Land
Overflowed Land
Overflowed Land
Overflowed Land
Levee
Levee
NAPA CREEK.
T4N, R4W
T3N, R4W.
CITY OF VALLEJO
SAN PABLO


T3N. R4W.
SAN PABLO BAY
OF VALLEJO
— SKETCH —
Showing Swamp and Overflowed Land
in Townships 3 and 4 North, Range 4 West, M.D.M.
Red lines indicate extent of Swamp & Overflowed Land

Sec. 25
Sec. 35
Sec. 11
A
B
T. 3 N., R. 4 W.
Narrow Strip
SAN
PABL


PABLO
BAY
LEGEND
Accepted Surveys
Accepted lines to be retraced
Original surveys to be accepted
Segregation lines as surveyed under State authority


S A


SAN
P
LEGEND
Accepted Su
Accepted lin
Original surv
Segregation

We offer the report of Francis E. Joy, U. S. Cadastral Engineer, dated October 23, 1922, and General Land Office letter of July 10, 1931, including the field notes, all as one exhibit.

(The documents were received in evidence and marked "Plaintiff's Exhibit U".) [248]

PLAINTIFF'S EXHIBIT U.

[Endorsed]: Filed Aug. 11, 1931. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
PUBLIC SURVEY OFFICE,
San Francisco, California,
August 6, 1931.

I, Frank E. Barker, Office Cadastral Engineer, do hereby certify that the annexed is a photostatic copy of the report of Francis E. Joy, U. S. Cadastral Engineer, to the U. S. Surveyor General, San Francisco, California, dated October 23, 1922, relative to Townships 3 and 4 North, Ranges 4 and 5 West, Mount Diablo Meridian, the original of which is on file in this office.

[Seal] FRANK E. BARKER,
Office Cadastral Engineer.

REPORT

on

LANDS PROPERLY BELONGING TO MARE ISLAND

in

Tps. 3 and 4 N., Rs. 4 and 5 W.

Of the Mount Diablo Meridian, in the State of California.

Executed by Francis E. Joy, U. S. Cadastral Engineer. In the capacity of U. S. Surveyor....., under Special Instructions dated Jan. 27, 1921, issued by the United States Surveyor General to govern surveys included in Group No. 96, which were approved by the Commissioner of the General Land Office, Feb. 28, 1921, and Assignment Instructions dated July 11, 1921 and June 20, 1922.

Survey commenced ....., 19 .

Data for report obtained Aug. 3, 1921 to June 26, 1922.

Survey completed ....., 19 .

U. S. Surveyor General,
San Francisco, Calif.

Dear Sir:

Complying with the Special Instructions for Group No. 96, dated January 27, 1921, the following report is submitted in relation to the swamp and overflow lands adjacent to Mare Island in Tps. 3 and 4 N., Rs. 4 and 5 W.

The division line between the lands claimed by the general public and the lands occupied by the Navy Department is well defined at this time by a wire fence, noted on the line between sections 10 and 15, T. 3 N., R. 4 W. I am told that this position was arrived at through a Federal court decision in 1914 and that the fence was built soon thereafter. A search at fence corners failed to reveal any marked corners other than a post 4 ins. sq., painted white, and marking acreage subdivision to the northwest.

The question presented, in which it is asked to determine the lands properly belonging to Mare Island in 1850, is rather difficult to solve at this time. Breakwaters, levees, dredging, and filling, having had a tendenacy to change the conditions in the time elapsed. Occular evidence by witnesses at this time is impossible. The particular place that seems to be in question is a narrow strip or neck of land between the main channel of Napa River and San Pablo Bay on the line between secs. 14 and 15.

From the report submitted in 1915 by W. J. Lightfoot, U. S. Surveyor, I note that he interviewed a certain James Lane, an employee at the Navy Yard, who stated that he had known the lands in question since 1866, and that at extraordinary high tides this neck of land was overflowed.

Mr. Lightfoot also reports an interview with a Mr. Thomas Dixon, who claimed to have knowledge

of the lands in question since 1853, and verified Mr. Lane's statement, also makes mention of a pond on the neck of land. This pond probably occupied the ground I have termed, between secs. 14 and 15, a flat without vegetation and having the appearance of dried up tide land.

I further verified these statements in an interview with Mr. Otto von Geldern, at present a Consulting Engineer of San Francisco, and formerly an employee in the engineering department on Mare Island during 1873 and 1874. He states that he has often observed water flow over this narrow strip of land at extra high tide. Mr. von Geldern has made a continuous study for years in relation to lands of this character and at the present time is the engineer for several bodies of land in T. 4 N., R. 4 W.

Between secs. 14 and 15, I have noted two small sloughs, draining easterly to the main channel of Napa River. I am of the opinion that these sloughs were the outlets or drainage for the ponds mentioned by Mr. Dixon on the narrow strip of land. I was unable to follow or trace a definite channel from the bay to the river in this vicinity. Although there has been more or less filling by the Navy Yard, I believe a defined channel would be found in places at this time.

A long breakwater, known as Dike 12, built in sections from 1908 to 1912, and noted at the meander corners of fracl. secs. 23 and 26, and secs. 25 and 26, apparently has created a settling basin in secs. 15, 22, 23, and 26, and is rapidly filling on the San

Pablo Bay side. At the present time, from the cor. of secs. 14, 15, 22, and 23, I estimate that it is a mile in distance to the edge of the water at low tide. This probably accounts for the fact that there is no defined bank along the Bay side in sec. 15.

Further investigations, to the northwestward along the shore of San Pablo Bay, failed to show a channel or slough that would divide the island into two portions, with the possible exception in the easterly part of sec. 6. Two levees leave the bay in a northerly direction and parallel to each other, join a levee around a slough farther to the north. It was noted while on the ground that an extra high tide carried water up to the northern levee. However I believe this is a barrow pit and not a natural water course.

It was further noted that numerous small sloughs originate close to the bay shore, that is 8.00 chs. to 15.00 chs. inland, but instead of finding their way into the bay, that the rule is to drain away from the shore to the sloughs farther north. From this it is evident that the waters in the bay built up a slight elevation along the shore, and for that reason the smaller sloughs drained northward to larger sloughs with outlets through large channels to the right and left where resistence is less. There is evidence along the N. side of the island that several small sloughs have left a main slough and after more or less meandering rejoined the slough from which it had left. For instance, in sec. 4 a small slough leaves Dutchman Slough in a westerly direc-

tion, later joining Dutchman Slough again in sec. 5. Such seems to be the case with the slough that U. S. Deputy Surveyor, James E. Freeman in 1877, named Montgomery. However, after investigating this slough. I believe that the main channel left South or Navy Yard Slough and joined with Dutchman Slough to the southward instead of westward as shown on his plat. This slough must have been rather shallow in as much as the levees cross it about 10.00 chs. back from the main sloughs.

The results of my investigations and observations while on the ground lead me to believe that there is no doubt that water at extra high tides, from San Pablo Bay, crossed over the narrow strip of land in secs. 14 and 15, at extra high tides and probably at ordinary high tides with a stiff wind from the southwest, but that the water crossed over the shore of the Bay more in the manner of an overflow, a broad sheet or spillway, without any definite channel, and only in one direction to the northeast away from the Bay. The slight elevation along the Bay shore forcing the water to drain northeastward to the main channel of Napa River. Therefore if this meets the definition of an island, Mare Island was bounded accordingly. However, from the conveyance in which it names "all the tule or low land and marsh belonging to same & etc.", it is my opinion that the island was bounded by waters that were considered navigable, and that the lands covered in my survey of Island No. 1 and Mare Island is one and the same island and that it extended into

R. 5 W., bounded on the North by South or Navy Yard Slough and Napa Slough, and on the West by Napa Slough and San Pablo Bay.

Very respectfully,

FRANCIS E. JOY,
U. S. Cadastral Engr.

San Francisco, Calif.
October 23, 1922.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
PUBLIC SURVEY OFFICE,
San Francisco, California,
August 6, 1931.

I, Frank E. Barker, Office Cadastral Engineer, do hereby certify that the annexed is a photostatic copy of a portion of the field notes relating to fractional Township 3 North, Range 4 West, Mount Diablo Meridian, as executed by Francis E. Joy, U. S. Cadastral Engineer, as approved on October 23, 1923, by the U. S. Surveyor General for California, the original of which is on file in this office.

[Seal] FRANK E. BARKER,
Office Cadastral Engineer.

Meanders of Tract No. 38, Mare Island Navy Yards.

N. 55° 04' W., 8.27 chs. To Angle Point No. 5, heretofore described.

GENERAL DESCRIPTION.

The portion of this fractional township east of the main channel of Napa River (Not including lands previously surveyed) and all of that portion lying west of Napa River and north of Tract No. 38, Mare Island Navy Yard, is hereby returned as swamp and overflow within the meaning of the Swamp Act of September 28, 1850. The soil on the uplands is a clay loam mixed with some fine gravel, nearly all under cultivation. The soil in the marsh lands is an adobe loam, very fertile, and used for pastures east of the river.

West of the main channel of Napa River I have surveyed the land in two bodies, one of which I have termed Island No. 1 and Mare Island, the second and smaller is covered by portions of secs. 3, 4, 5, 9, and 10. The latter island is unprotected by levees and is covered with a heavy growth of tules and swamp grasses. The soil as an loam and would produce equal results with nearby islands if reclaimed. Island No. 1 is protected by levees and the major portion within the township has been cultivated. The soil, and adobe loam, is rather light because of the extensive root system of the previous marsh growth. The larger part of Mare Island is heavy rolling land, and at the south end reaches an approximate elevation of 200 ft. The Navy Department shops and works are along the water front facing Mare Island Straits and opposite the city of Vallejo.

Dutchman Slough, which is the S. bdy. of the island in secs. 3, 4, 5, 9, and 10 is used more or less at high tide as a passway for boats and some barges with shallow draft.

At low tide this slough is very narrow and shallow for about a half mile before joining South or Navy Yard Slough, and for that reason is avoided as a water passway to some extent.

All of the land west of the main channel of Napa River and north of fence at N. bdy. of Mare Island Navy Yard is supposed to be covered by State Segregation Survey No. 569. I was unable to find any definite marks of this survey, neither could the Agent for the present claimants of the lands tell me of an existing mark.

June 25, 1922: At 9h a. m., on the true meridian in sec. 4, I determine the magnetic declination to be 18° 35′ E., and no material difference was noted throughout the township.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
PUBLIC SURVEY OFFICE,
San Francisco, California,
August 6, 1931.

I, Frank E. Barker, Office Cadastral Engineer, do hereby certify that the annexed is a photostatic copy of a letter from the Commissioner of the Gen-

eral Land Office, Washington, D. C., dated July 10, 1931, the original of which is on file in this office.

[Seal] FRANK E. BARKER,
Office Cadastral Engineer.

Address Only the Commissioner of the
General Land Office

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Washington

Jul. 10, 1931.

In Reply Please Refer to
1423855 "E" EGH
: Group 96, California.

District Cadastral Engineer,
Public Survey Office,
417 Market Street,
San Francisco, California.

Sir:

Mr. Edmund Burke on July 2, 1931, advised the Secretary of the Interior that the unaccepted plat showing the subdivision of the Mare Island Naval Reserve in T. 3 N., R. 4 W., M. D. M., California, is in the files of your office and requested that you be directed to furnish him with a certified copy of said plat.

The plat requested is the original plat of the survey executed by Engineer Joy showing the subdivision of the Mare Island Naval Reserve. This survey was not accepted and was ordered revised

by departmental decision of August 17, 1923. By letter dated September 19, 1923, approved by the First Assistant Secretary on the same date, the Surveyor General was directed to prepare special instructions providing for the necessary field work as outlined in departmental decision of August 17, 1923. The plat and field notes were returned to the Surveyor General on October 15, 1923. The revised plat of survey was accepted on November 8, 1923.

Mr. Burke was advised on July 8, 1931, by the Acting Secretary as follows:

> "If the unaccepted plat of T. 3 N., R. 4 W., showing the subdivision of the Mare Island Naval Reserve, has been kept by the public survey office at San Francisco, California, the Department has no objection to that office furnishing you with a certified copy of said plat. However, in order that there will be no doubt as to the official standing of the plat, the public survey office will be directed to place upon the plat a statement that will clearly show that it is a plat of an unaccepted survey and has no official standing. Also, the certification will indicate the facts in the case. The Commissioner of the General Land Office will instruct the District Cadastral Engineer at San Francisco, California, relative to granting your request."

and you are accordingly directed, if the plat is in your office, to furnish Mr. Burke with a certified copy.

It is suggested that the following statement be placed upon the plat before a copy is made and also incorporated in the certificate in substance:

> This plat of T. 3 N., R. 4 W., M. D. M., California, represents a survey which has not been accepted by the Commissioner of the General Land Office and which was ordered revised by departmental decision of August 17, 1923, in the case of State of California, Balfour-Guthrie Investment Company, interveners, and accordingly has no official standing as the representation of a survey made by the General Land Office.

The Navy Department has also requested a certified copy of this unaccepted plat. Mr. Philip Buettner, Principal Attorney, Navy Department, has been informally advised that the request for the copy of the plat should be made at your office. When this request is received a certified copy will be furnished without cost. All certified copies will be prepared in the manner outlined in this letter.

Very respectfully,

D. K. PARROTT,

Acting Assistant Commissioner.

Mr. PECKHAM: I would like, at this time, pursuant to notice, to move for leave to file an amendment to the bill of complaint, reciting the survey of Mare Island by Freeman, and the approval of that survey.

The COURT: Motion granted. I suppose you wish to have the amendment deemed denied?

Mr. KELBY: Yes.

Mr. PECKHAM: I will stipulate that it be deemed denied.

TESTIMONY OF HENRY L. VAN WINKLE

A witness for Plaintiff

I am the Secretary of the California Society of Pioneers and in charge of the library. I have been subpoenaed to and I herewith produce two books, the first the historical atlas of Solano County, dated 1878, which is from the archives of the Pioneers' Society Library. This book is accepted as an authentic book of Solano County of the date it bears date.

Mr. PECKHAM: This photostat of the first page, or preface, and some data appears, particularly this map of Solano County, a map of Mare Island and an enlargement of that map of Mare Island, and further a map of the north Navy Yard at Mare Island.

WITNESS continuing: The second book which I produce is a history of Solano and Napa Counties by Tom Gregory, a gift of Edwin H. Sawyer, who was one of our members and presidents. This book is also from the archives of the Pioneers' Society and is considered an authentic presentation of the biographies in it and is consulted constantly. The biography of Edwin H. Sawyer, found at Page 655-56 of this book, is the man who donated the book and whose presentation is on the front page.

(The two documents were received in evidence.)

Mr. KELBY: I object to it as immaterial, irrelevant and incompetent and as an attempt to vary the description contained in the deed of conveyance from Aspinwall, et al., to the United States. [249]

The COURT: Overruled and exception.

(The two documents were received in evidence as "Plaintiff's Exhibit W".)

Mr. PECKHAM continuing: We offer in evidence the photostat from the History of Solano and Napa Counties of the life of Edwin and Henry Sawyer and as part of the same exhibit the file of the General Accounting Office Payroll as of August 11, 1879, showing that E. H. Sawyer was Corresponding Clerk in the Office of the United States Surveyor General of California on August 11, 1879 and the Chief Correspondence Clerk for Theodore Wagner, who wrote the Wagner letter.

(The document was received in evidene as part of "Plaintiff's Exhibit W".)

PLAINTIFF'S EXHIBIT W

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

HISTORY OF SOLANO AND NAPA COUNTIES

where he is a large property owner and where, before his retirement from all public and business

cares, he served as postmaster, road supervisor and justice of the peace. Although now retired, he maintains a warm interest in all local and state activities. Few have done more than he to advance the welfare of his community and none has displayed a more steadfast interest in all movements for the material, moral and educational upbuilding of town and county.

EDWIN HENRY SAWYER.

Out from the valley of the far-distant past, memories of pioneer experiences refresh the declining years of Mr. Sawyer and form a sacred link between the chaos of the frontier and the refinements of a twentieth-century civilization. Gone are the majority of his comrades of the historic '50s; gone, too, are the enthusiasm and unwearied energies of his youthful years; but there still remain, to cast a golden glow over life's restful twilight, happy memories of the associations and the activities of bygone days. Perhaps no recollection is more deeply impressed upon his mind than that of his long voyage in 1851 from the shores of the Atlantic ocean via Nicaragua to the Pacific coast, where he joined his father, Jesse Sawyer, a pioneer of '49, and a man of forceful ability, well qualified to meet all problems connected with frontier existence. The family had been early established in Massachusetts and long identified with Haverhill, that state, where Edwin H. was born in 1831 and whence his father had migrated to the Pacific coast, making the long voy-

age around the Horn on the sailing ship Leonore, and acting as vice-president of the company of one hundred persons on board the vessel.

The historic Sawyer house, occupying a prominent location on the waterfront at Benicia, was built by Jesse Sawyer and under his keen oversight developed into one of the most popular inns of pioneer days. Among its guests from time to time were men prominent in the material and political history of the commonwealth. For years it was a favorite stopping place of the traveling public, who were attracted no less by the geniality of the proprietor than by the close attention given to their material welfare. The young easterner who landed at Benicia in 1851 sought employment there and soon received an appointment as agent for the Adams Express Company, in which capacity he made many trips over the hills from Benicia to Vallejo. No roads had been laid out. Travel was attended by innumerable hardships. Only men of pluck and daring were willing to accept positions necessitating constant travel. The legislature held its sessions at Vallejo, and when the express agent attended the sessions he found the members armed with revolvers and sitting with their feet on their desks. Dignity was not a characteristic of the early legislators, but what they lacked in refinement they made up in energy.

Two years of service as express agent on the frontier terminated in 1853 with the return of Edwin H. Sawyer to the east, the trip being made via Panama. It was his intention to remain perma-

nently in New England, but the west had cast its fascinating spell upon him and in 1858 he returned to California, securing a position as clerk to his father, the naval store keeper at the Mare Island navy yard. Later he was transferred to different departments and eventually won a promotion to the position of chief accountant in the commandant's office at the navy yard. A visit of one year in Japan and adjacent countries gave him a comprehensive knowledge of that portion of the world. During 1862 he went east overland by stage and became chief clerk to the naval constructor of the Boston navy yard, but afterward returned to California and again resumed government service at Mare Island. Early in the '70s he erected a commodious residence at Vallejo overlooking the bay and this building is now considered one of the landmarks of the locality. During 1875 he secured a position in the San Francisco office of the United States surveyor general and for sixteen years he continued in the same capacity, discharging manifold responsibilities with devotion, tact and intelligence. Meanwhile, on two occasions, he was sent to Colusa county for the purpose of examining and auditing the books of the county officials, a task for which his expertness in accounting admirably qualified him.

Since retiring from business Mr. Sawyer has made his home part of the time at Berkeley, where he resides at No. 2640 Warring street, but he is so fond of the country that he passes a large part of each year on his ranch of one hundred and sixty acres, known as the Altissimo ranch, which lies in

Napa county a short distance back from Vacaville, Solano county. He finds enjoyment in setting out and watching the growth of the fruit trees on his ranch, in making improvements as needed and in directing the management of the property. On New Year's of 1866 he became a member of the Society of California Pioneers and ever since then he has been interested in the work of that organization. Much of his please is derived from association with other pioneers and in witnessing the remarkable development of the commonwealth with whose beginning he was associated as an early settler.

WALLACE T. RUTHERFORD.

A prominent attorney of Napa, Cal., Wallace T. Rutherford was born in Vallejo, Solano county, August 7, 1876. He received his primary education in the public schools of his native city and Calistoga and later attended Heald's Business College in San Francisco for one year, fitting himself for general commercial work. Completing this course he had made up his mind to study law, and to carry out his plans he went to Merced and for the following three and one-half years studied in the office of J. W. Knox, one of the most prominent lawyers of that city. By devoting himself assiduously to his study he was admitted to practice before the supreme court of the state on September 8, 1898. In the same month he came to Napa and opened an office and in the years that have intervened he has

built up a lucrative practice throughout the city and county. Besides this he has won the friendship of an ever increasing circle of friends by his genial nature and his strict integrity. Always popular as a citizen he was appointed to the office of city attorney of Napa, in 1907, and so faithfully did he perform his duties that he received the nomination for the office and was elected at the following election in 1909 and re-elected in 1911 for a term of four years. His efficiency and popularity are ever to the fore when he is spoken of by those with whom he has had business or social relations.

Mr. Rutherford's time has not been entirely taken up with his chosen profession for he has found time and opportunity to enter into the commercial field and is president and sole owner of the Shoults Paper Box Company of Napa, one of the prosperous concerns that has assisted in developing the city. In fraternal circles he has become an active participant and is a member of the Masons, the Eastern Star, Benevolent Protective Order of Elks, Order of Eagles, Woodmen of the World, Modern Woodmen of America, Native Sons of the Golden West, and is a "Fifth Degree" Granger. As an American citizen Mr. Rutherford is patriotic and he is first lieutenant, Company H, Second Regiment, National Guard of California. Since 1906, he has been secretary of the Republican County Central Committee and has taken a very active part in the politics of the county. He has been

United States [Insignia] of America

GENERAL ACCOUNTING OFFICE

Pursuant to the Act of June 10, 1921, 42 Stat. 24, I hereby certify that the annexed documents, numbered R-1 to R-5, inc., are true copies of the official documents now on file in the General Accounting Office in the following case: Theodore Wagner.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the General Accounting Office to be affixed this 6th day of April, in the year 1932, at Washington.

[Seal] R. N. ELLIOTT
Assistant Comptroller General of the United States.

Report No. 34102

GENERAL LAND OFFICE,

October 25, 1879

I HEREBY CERTIFY that I have examined and adjusted an account between the United States and Theo. Wagner, Surveyor General of California, under the appropriation of No. 2,2750, Acts of Mch. 3, and June 21, 1879, "For salaries, office Surveyor General of California, 1880," during the quarter ending September 30, 1879, and find that the latter stands chargeable thereon as follows, to wit:

To balance due from him per General Land Office Report No.	Amount.
To warrant No. 1325 dated July 30, 1879,	5687.50

I also find him entitled to credit as follows:

By amount of disbursements made by him during the quarter ending Sept. 30, 1879, as per abstract A and accompanying vouchers filed herewith	5256.16
Leaving a balance due the United States	431.34

As appears from the account, Register's Certificate, and vouchers herewith transmitted for the decision of the First Comptroller of the Treasury thereon.

J. M. ARMSTRONG
Actg. Commissioner.

To Hon. A. G. Porter,
First Comptroller of the Treasury.
Treasury Department,
Comptroller's Office,
December 9, 1879.

I admit and certify the above balance of $431.34 due the United States.

[Signature Illegible]
Acting Comptroller.

To the Register. W. L.

(A.)

ABSTRACT of payments made by Theo. Wagner, Surveyor General of California, under the appropriation of No. 2,2750. Acts of Mch. 3 and June 21, 1879, "For salaries, office Surveyor General of California, 1880," during the quarter ending September 30, 1879.

Date 1879	No. of Voucher	TO WHOM AND FOR WHAT PAID		Amount Paid.
Aug. 11	1	Theo. Wagner	Surveyor General	231.00
11	2	J. A. Robinson	Chief Clerk	168.50
11	3	J. H. Wildes	Chief Draughtsman	168.50
11	4	S. N. Bliven	Clerk of accounts	151.00
11	5	E. H. Sawyer	Corresponding clerk	151.00
11	6	R. Gibbons	Draughtsman	151.00
11	7	John Clar	Translator	168.50
11	8	A. E. Gans	Clerk	16.90
11	9	Anna Alexander	do	81.52
11	10	Geo. O. Jewett	do	97.83
11	11	Katie Short	do	67.93
16	12	A. L. Bancroft and Co.	Stationery for Spanish Archives	343.00
29	29	Theo. Wagner	Surveyor General	231.00
29	30	J. A. Robinson	Chief Clerk	168.50
29	31	J. H. Wildes	Chief Draughtsman	168.50
29	32	S. N. Bliven	Clerk of accounts	151.00
29	33	E. H. Sawyer	Corresponding clerk	151.00
29	34	R. Gibbons	Draughtsman	151.00
29	35	A. Bannister	do	121.74
29	36	L. E. R. Scidmore	Clerk	84.20
29	37	Minnie Moss	do	62.50
29	38	Anna Alexander	do	84.20
29	39	Geo. O. Jewett	do	101.10
29	40	John Clar	Translator	168.50
29	41	A. E. Gans	Clerk	19.54
29	42	Katie Short	do	84.20
Sept. 27	61	Theo. Wagner	Surveyor General	224.30
27	62	Theo. Reichert	Chief Clerk	163.00
27	63	J. H. Wildes	Chief Draughtsman	163.00
27	64	S. N. Bliven	Clerk of accounts	146.80
27	65	E. H. Sawyer	Corresponding Clerk	146.80
27	66	R. Gibbons	Draughtsman	146.80
27	67	A. Bannister	do	130.40
27	68	John Clar	Translator	163.00
27	69	Geo. O. Jewett	Clerk	97.80
27	70	Anna Alexander	do	81.00
27	71	Katie Short	do	81.00
27	72	Minnie Moss	do	81.00
27	73	L. E. R. Scidmore	do	81.00

Making an aggregate of....5256.18

General Land Office,
October 25, 1879.

Examined and stated by
J. W. DONNELLEY

General Land Office Report No. 34102
Dated October 25, 1879
Report of Adjustment of
QUARTERLY ACCOUNT
of
Theo. Wagner
Sur. Genl. of California
on a/c of Salaries
For the Quarter ending Septr. 30, 1879
For $5256. 16/100
R. and E. Oct. 29th, 1879
R. W. L.
Ent. Dec. 31/79 H M T

THE UNITED STATES
To E. H. Sawyer Dr.

For services as Clerk of Correspondence in the Office of the U. S. Surveyor-General for California, during the quarter ending Sept. 30, 1879,—from July 1, 1879, to July 31, 1879, inclusive, 31 days @ the rate of $1,800.00 per annum—$151.60/100.

Received Payment

E. H. SAWYER
Clerk of Correspondence

U. S. Surveyor-General's Office,
San Francisco, July 31, 1879.

I hereby certify that the foregoing account is correct and that there is due E. H. Sawyer the sum

of One hundred and fifty one & 60/100 Dollars, as above stated.

THEO. WAGNER
U. S. Surveyor-General for California.

#5 34102
ACCOUNT
of
E. H. Sawyer
Clerk of Correspondence
$151.60
U. S. Surveyor-General's Office,
San Francisco,
July 31st, 1879

THE UNITED STATES
To E. H. Sawyer Dr.

For services as Clerk of Correspondence in the Office of the U. S. Surveyor-General for California, during the quarter ending Sept. 30, 1879,—from Aug. 1, 1879, to Aug. 31, 1879, inclusive, 31 days @ the rate of $1,800.00 per annum—$151.60/100.

Received Payment

E. H. SAWYER
Clerk of Correspondence

U. S. Surveyor-General's Office,
San Francisco, Aug. 31, 1879.

I hereby certify that the foregoing account is correct and that there is due E. H. Sawyer the sum

of One hundred and fifty one & 60/100 Dollars, as above stated.

THEO. WAGNER
U. S. Surveyor-General for California.

#33 34102
ACCOUNT
of
E. H. Sawyer
Clerk of Correspondence
$151.60
U. S. Surveyor-General's Office,
San Francisco,
Aug. 31, 1879.

THE UNITED STATES
To E. H. Sawyer Dr.

For services as Clerk of Correspondence in the Office of the U. S. Surveyor-General for California, during the quarter ending Sept. 30, 1879,—from Sept. 1, 1879, to Sept. 30, 1879, inclusive, 30 days @ the rate of $1,800.00 per annum—$146.80/100.

Received Payment

E. H. SAWYER
Clerk of Correspondence

U. S. Surveyor-General's Office,
San Francisco, Sept. 30, 1879.

I hereby certify that the foregoing account is correct and that there is due E. H. Sawyer the sum

of One hundred and forty six and 80/100 Dollars, as above stated.

THEO. WAGNER
U. S. Surveyor-General for California.

No. 65 34102

ACCOUNT
of
E. H. Sawyer
Clerk of Correspondence
$146.80/100
U. S. Surveyor-General's Office,
San Francisco,
Sept. 30, 1879.

For Sales Prior to and Including 1891

CERTIFICATE OF REDEMPTION OF REAL ESTATE PURCHASED BY THE STATE

ESTIMATE of the amount required to redeem the within described real estate, for the delinquent taxes of 1873, and redeemed on the 10th day of October 1928 in accordance with the provisions of Section Three Thousand Eight Hundred and Seventeen of the Political Code, approved March 2, 1883.

ASSESSED TO E. H. SAWYER & UNKNOWN OWNERS CERTIFICATE NO.____

Description of Real Estate

A tract of Swamp and Overflowed Land situate in Solano County being a part of Mare Island and Survey #34—S O Land, described as follows, to wit:

Fraction in S. E. ¼ of Sec. 10: Twp. 3 N. R. 4 W.)
" " N. E. ¼ " " 15: " 3 N. R. 4 W.) 164½ Acres
" " W. ½ " " 14: " 3 N. R. 4 W.)

Vallejo

Assessed value for the year of sale	$493.00
Delinquent State and County Taxes of 1873	$ 9.36
Delinquent Special School Tax	
Five per cent penalty for delinquency	.46
Delinquent Poll Tax	
Costs	
Interest on the amount of Taxes, from July 1st, 1874	35.56
State and County Taxes of (computed on assessed valuation for year of sale)	
Special School Tax	
Interest on above amounts from July 1	
State and County Taxes of (computed on assessed valuation for year of sale)	
Special School Tax	
Interest on above amounts from July 1	
State and County Taxes of (computed on assessed valuation for year of sale)	
Special School Tax	
Interest on above amounts from July 1	
State and County Taxes of (computed on assessed valuation for year of sale)	
Special School Tax	
Interest on above amounts from July 1	
Total Amount Necessary to Redeem	45.38

State of California,
County of Solano.

I, Bert Sheldon, County Auditor in and for said County, State aforesaid, do hereby certify that the foregoing statement contains a full and correct estimate of the amount necessary to redeem the within described real estate, made in accordance with the provisions of Section 3817, Political Code, approved March 2, 1883.

Witness my hand, affixed at Fairfield, this 10th day of October 1928.

BERT SHELDON,
County Auditor.
By.....Deputy.

OFFICE OF THE COUNTY TREASURER,
COUNTY OF SOLANO

RECEIVED OF HEIRS of E. H. SAWYER, Redemptioner, FORTY FIVE and 38/100 DOLLARS, in lawful money of the United States, upon redemption of the within described real estate under the provisions of Section 3817 of the Political Code, approved March 2, 1883.

Witness my hand this 10th day of October, 1928.

GEORGE WENIGER,
County Treasurer.
By Trainor, Deputy.

RECEIVED OF HEIRS OF E. H. SAWYER, Redemptioner, a copy of the within estimate, certificate and receipt, this 10th day of October 1928.

BERT SHELDON,
County Auditor.
By.....Deputy.

2787-S.
U. S. v. O'Donnell, et al.
Defts' Ex. No. I for Iden.
8/5/31.
J. A. S., Deputy Clerk.

SHERIFF'S DEED

Isaac Hobbs, Sheriff of	Dated 3rd Dec. 1870
Solano County, Cal.,	Rec. 3rd Dec. 1870.
—to—	In L-1 Deeds, Page 423.
Edwin H. Sawyer.	$2.50 U. S. I. R. Stps.

Whereas, by virtue of a writ of execution issued out of and under the seal of the District Court of the Fourth Judicial District of the State of California, tested the 21st day of March 1870, upon a Judgment recovered in said Court on the 18th day of January 1870 in favor of Isaiah Hanscom, Plaintiff and against Thomas H. Heermans Defendant to the said Sheriff directed and delivered, commanding him that out of the personal property of said Judgment debtor in his County, he should cause to be made certain moneys in the said writ specified and if sufficient personal property of the said Judgment debtor could not be found then he should cause the amount of said Judgment to be made out of the real property belonging to said Judgment debtor on the 18th day of Jan. 1870 or at any time afterwards. And whereas because sufficient personal property of the said Judgment debtor could not be found whereof the said Sheriff could cause to be made the moneys specified in said writ, the said Sheriff did

in obedience to said command levy on, take and seize all the right, title, interest and claim which the said Judgment debtor so had to the lands, etc., hereinafter particularly set forth and described, with the appurtenances and did on the 16th day of April 1870, sell all the right, title, interest and claim of the said Judgment debtor in and to the said premises at public auction in front of the Court House door in the Town of Fairfield in said County of Solano between the hours of nine in the morning and five in the afternoon of that day, namely at 12 o'clock noon, after having first given due notice of the time and place of such sale according to law, at which sale, all the right, title, interest and claim of the said Judgment debtor in and to the said premises were struck off and sold to the said second party, for the sum of $2110. The said second party being the highest bidder and that being the highest sum bid for the same, whereupon the said Sheriff after receiving from said purchaser the said sum of money so bid as aforesaid gave to the said second party such certificate of said sale as is by law directed to be given, and a duplicate of such certificate was duly filed by the said Sheriff in the office of the Recorder of the County of Solano.

And whereas, the time allowed by law for the redemption of said property has expired without such redemption having been made,

Does grant, bargain, sell, convey and confirm unto the said second party, etc., all the right, title, interest and claim which the said Judgment debtor,

Thomas H. Heermans had on the said 18th day of January, 1870 or at any time afterwards, or now has in and to all those certain lots, etc., of land, situate, etc., in Solano County, Cal. and bounded and particularly described as follows, to-wit:

(Being property not under search.)

Also, an undivided one seventh (1/7) of 164.55 acres of land on, or adjoining Mare Island in Solano County, Cal., and described in the Patent and Solano County Records, to which reference is hereby made, as follows, to-wit:

The South fractional half of the South East quarter of Section Number 10. The north east fractional portion of the North East quarter of Section number 15, The South West fractional portion of the North West quarter of Section number 14, and the North East fractional portion of Section number 14, lying and being between San Pablo and Napa Bays, and being in Township number 3 North of Range 4 West of Mount Diablo Base and Meridian and conforming to the United States Survey, now standing on Solano County Records in the names of Charles A. Secor, James F. Secor, R. Moody, Isaiah Hanscom, and William A. Heermans.

(And other property not under search.)

Together with, etc.,

To have and hold, etc.,

In Witness Whereof, etc.,

S. S. & D. in the Presence of

[L. S.] ISAAC HOBBS,

Sheriff of the County of Solano,

State of California.

Acknowledged: 3rd Dec. 1870. By Isaac Hobbs, Sheriff of Solano County, Cal. (L. S.) Before L. C. Hays, Notary Public, in and for Solano County, Cal.

Mr. PECKHAM, continuing: Also as part of Exhibit "W", we offer Defendants' Exhibit "I" for identification, also the certificate of redemption of real estate purchased and identified by Mr. Burke at the last hearing, redemption from Tax Sale for delinquent taxes of 1873, assessed to E. H. Sawyer and unknown owners.

(The documents were attached to "Plaintiff's Exhibit W",) subject to the same objection heretofore made and overruled and exception.

Mr. PECKHAM: We offer also a copy of the Sheriff's deed to EDWIN H. SAWYER, under date of 1870, recorded in L-1 of Deeds, Page 423 of the Records of Solano County, which we ask to be admitted as part of Government's Exhibit "W".

TESTIMONY OF MARY M. DOYLE.

A witness for Plaintiff.

I am a representative of the City and County Library in San Francisco and was subpoenaed to and here produce the files of the Alta-California for the month of October, 1877, which is the only one we have for that month. [250]

Mr. PECKHAM: I offer in evidence a certified copy of the record and map from the case of the

United States vs. Pacheco, in the Supreme Court, showing two of the islands in the Dunbarton Hills, the Ceritos, at Dunbarton, cut off by navigable streams, as the record shows, from the main land, and further, that the final survey, as established, blotted out the swamp and overflow.

Mr. KELBY: We object to the introduction of that document on the ground that it is immaterial, irrelevant and incompetent and an attempt to impeach the patent of the United States to California, and equally the patent of the State of California, Darlington and further an attempt to vary the description contained in the conveyance from Aspinwall, et al., to the United States, introduced in evidence in this case.

The COURT: Overruled and exception.

(The document was received in evidence as "Plaintiff's Exhibit X".)

PLAINTIFF'S EXHIBIT X.

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

The United States vs. Pacheco

101 came on to be heard before the said Supreme Court, on the said transcript of the record, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, affirmed. Feb. 20th.

You, therefore, are hereby commanded that such further proceedings be had in said cause, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the honorable Roger B. Taney, chief justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and fifty-nine.

WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

Endorsed: Filed August 9, 1860.

W. H. CHEVERS, Clerk.

102 Petition of U. S. att'y, and affidavit to return and reform survey.

U. S. dist. court, nor. dist. of Cal.

Pacheco and Alviso
vs. No. 119.
The United States.

The surveyor general of California has surveyed the ranch claimed in the above-entitled cause. On the 20th of November, 1860, he made his first publication, giving notice to that effect. The United States are interested in said survey for the reason that the same is erroneous in the respect that it includes public land, and is in other particulars not conformable to the grant or decree in said cause.

The United States, by Calhoun Benham, their district attorney, pray the survey may be ordered into court and reformed.

CALHOUN BENHAM,
U. S. Att'y.

The United States district court for the northern district of California.

The United States, appellants, in the matter
103 of the survey of the "Potrero de los Serritos," claimed by and decreed to Thomas Pacheco and Augustin Alviso. No. 119.

City and County of San Francisco, ss:

On this 14th day of December, A. D. 1860, personally appeared before me, Cutler McAllister, U. S. commissioner, Daniel M. Salmon, who, being duly sworn, deposes and says as follows:

First. That deponent is a resident of Alameda county, State aforesaid, and a citizen of the United States.

Second. That this deponent has resided permanently for and during the last six and one-half years upon a small island of land in the bay of San Francisco, in the township of Washington, in said Alameda county, containing about seventy acres.

Third. That one Thomas Nelson has also resided upon another adjacent island, similarly situated, for and during about four years, containing about eighty acres.

Fourth. Both of said islands are entirely cut off and separated from the main land by the waters of the bay of San Francisco.

Fifth. That said ranch has been divided
104 and partitioned between said Pacheco and Alviso some several years since; that by such division and segregation that portion of the said

ranch to which said islands are adjacent fell to and became the undivided share and interest of said Augustin Alviso.

Sixth. At the time of and always since said partition (until very recently) said Alviso has uniformity declared and published that said two islands were not embraced in his claim of his said share of said ranch, nor in the original grant, and that he had no claim to or interest in the same; and this deponent, upon reliable information, avers that said islands are not within the limits of said original grant, but that the same are public lands of the United States.

Yet the surveyor general, by his deputy, has caused said ranch to be surveyed, and has embraced within the boundaries thereof said two islands.

It is alleged for error that said surveyor general should not have so embraced said islands in his said survey, which survey has been duly returned and approved by said surveyor general.

D. M. SALMON.

105 Subscribed and sworn to before me this 14th day of Dec'r, A. D. 1860.

[Seal] CUTLER McALLISTER,
U. S. Com.

Endorsed: Filed Dec. 17, 1860.
W. H. CHEVERS, Clerk.

Order to return survey.

At a stated term of the district court of the United States of America for the northern district of California, held at the court-room in the city of San Francisco, on Monday, the 17th day of December, in the year of our Lord one thousand eight hundred and sixty.

Present: The honorable Ogden Hoffman, district judge.

The United States	In land cases.
v.	District court No. 119.
Tomas Pacheco et al.	Land com. No. 258.

And now at this day, on application of Calhoun Benham, attorney for the United States, it is ordered that the surveyor general of the United States for California return into this court, on or before Wednesday, the second day of January, A. D. 1861, his official survey and plat of the land finally confirmed in the above-entitled cause, known as "Potrero de los Cerritos," and situated in the county of Alameda, in said district. And it is further ordered that the United States marshal for this district serve upon the said surveyor general, without delay, a certified copy of this order, and make due return hereon.

Endorsed: Served personally by copy on J. W. Mandeville, U. S. surveyor general for Cal'a.

P. L. SOLOMON,
U. S. Marshal,
By L. D. SOLOMON,
Deputy.

San Francisco, December 17th, 1860.

Returnable January 2nd, 1861.—Issued December 17, 1860.—Filed December 18, 1860.

W. H. CHEVERS, Clerk.

107 Monition.

United States of America,

Northern District of California, ss:

The President of the United States of
[Seal] America to the marshal of the United States for the northern district of California, greeting:

Whereas objection has been made to the official survey and location of the land finally confirmed in case No. 119, to Tomas Pacheco et al., known as "Potrero de los Cerritos," and situated in the county of Alameda, in said district:

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to give due notice to all parties having or claiming to have an interest in such survey and location, that they be and appear before the district court of the United States for said district, sitting in land cases, on or before Wednesday, the 2nd day of January, A. D. 1861, at 11 o'clock a. m., (if that day shall be a day of jurisdiction, and if not, on or before the next Wednesday thereafter,) then and there to intervene for the protection of such interest, or their defaults will be taken. And what you shall have done under this writ do you

108 then and there make return thereon.

Witness the Hon. Ogden Hoffman, judge

of said court, at San Francisco, in said district, this 17th day of December, A. D. 1860.

W. H. CHEVERS, Clerk

Endorsed: The within monition was received by me on Monday, the 17th day of Dec'r, 1860, and in obedience thereto I have given due notice as therein commanded, by causing the publication of said notice for three consecutive Wednesdays, in the San Francisco Herald, commencing on the 19th day of Dec'r, 1860; and for two consecutive Saturdays in the "Alameda Co. Gazette," a paper published nearest the land, commencing on the 22nd day of Dec'r, 1860.

Dated San Francisco.

————————, U. S. Marshal.

Returnable January 2nd, 1861.—Issued December 17, 1860.—Filed January 2nd, 1861.

W. H. CHEVERS, Clerk.

109 Order on return of motion.

At a stated term of the district court of the United States of America for the northern district of California, held at the courtroom in the city of San Francisco, on Wednesday, the second day of January, in the year of our Lord one thousand eight hundred and sixty-one.

Present: The honorable Ogden Hoffman, district judge.

The United States v. Tomas Pacheco et al. — In land cases.— District court No. 119.— Land com. No. 258.

And now at this day, the United States marshal having made return upon the monition heretofore

issued in this cause, that he had given due notice as therein commanded, on motion of C. Benham, attorney for the United States, proclamation was made that all parties having or claiming to have an interest in the survey and location of the land finally confirmed in the above-entitled cause, appear and intervene for the protection of such interest, Calhoun Benham, U. S. att'y, appeared for the United States, and Johnson and Rose and John J.
110 Williams appeared for the claimants, and no other party appearing, whereupon it is ordered that the default of all parties not appearing as aforesaid be, and the same is hereby, entered.

Endorsed: Filed January 2, 1861.

W. H. CHEVERS, Clerk.

(Here follows plat; see final decree.)

111 Order allowing U. S. att'y ten days farther time to except to survey.

At a stated term of the district court of the United States of America for the northern district of California, held at the court-house in the city of San Francisco, on Monday, the fourth day of March, in the year of our Lord one thousand eight hundred and sixty-one.

Present: the honorable Ogden Hoffman, district judge.

The United States

v. No. 119.

Tomas Pacheco et al.

And now, at this day, on motion of Mr. Benham, U. S. att'y it is ordered by the court that he have

ten days farther time to file exceptions to survey.
Endorsed: Filed March 4, 1861.

W. H. CHEVERS, Clerk.

112 Order opening default and allowing H. P. Jones to intervene.

At a stated term of the district court of the United States of America for the northern district of California, held at the court-house in the city of San Francisco, on Monday, the fourth day of March, in the year of our Lord one thousand eight hundred and sixty-one.

Present: the honorable Ogden Hoffman, district judge.

The United States
v. No. 119.
Tomas Pacheco et al.

And now, at this day, on motion of Wm. Carey Jones, esq., it is ordered by the court that the default heretofore entered in this cause be, and is hereby, opened, so far as to allow H. P. Jones to intervene for his interest herein.

Endorsed: Filed March 4, 1861.

W. H. CHEVERS, Clerk.

113 Exceptions of U. S. to survey.

District court of the United States in and for the northern district of Calif'a.

The United States
v. Potrero de los Serritos.
Thomas Pacheco et al.

Exceptions to survey.

And now comes the United States, and by their attorney, Calhoun Benham, excepts to the survey of the land claimed herein, made under final decree, the field-notes of which were approved by the U. S. surveyor gen'l for California, on the day of , 1860; and a certified copy of the plat whereof was filed in this court, pursuant to its order, on the 28th day of January, 1861.

And the United States makes the following exceptions to said survey:

1st: That said surveyor is erroneous, in this: that in running the west line of said claim upon the Bay of San Francisco, at least two leagues of salt land are left out of, and excluded from, the boundaries of said claim, thereby, in order to obtain the amount confirmed by the decree, taking and embracing two leagues on the east and interior of good arable land.

2nd. That in running said west line upon
114 said bay, after excluding said two leagues of salt land, the surveyor run said line so as to embrace and include about one league of salt land, and thereby taking in two islands located far below high tide water, and which are surrounded by the waters of said bay.

Therefore the United States pray that said survey be set aside for the reasons above set forth, and for an order directing said United States surveyor general to cause a resurvey of said land, in conformity to the interest and meaning of said final decree, so as to embrace all or none of said salt land, so overflowed and surrounded by the tide-waters of said bay.

CALHOUN BENHAM,
U. S. Att'y.

Endorsed: Filed March 9, 1861.
W. H. CHEVERS, Clerk.

115 Dep. of Louis Cammann on part of U. S.

In the district court of the United States for the northern district of California.

The United States v. Thomas Pacheco et al. In land cases.— Dist. court No. 119.— Land com. No. 258.

Be it remembered, that on this 4 day of April, A. D. 1861, at San Francisco, in the district aforesaid, before me, Blair Laurie, a commissioner, duly appointed by the district court of the United States for the northern district of California, to take depositions of witnesses in behalf of the United States in land cases pending in said court, personally appeared Louis Cammann, a witness produced in behalf of the United States in the above-entitled cause, now pending in said court under the acts of Congress to ascertain and settle the private land

claims in the State of California, who being duly sworn, testified as follows:

Present: U. S. att'y for U. S., S. Johnson, esq., and W. Carey Jones, esq., for claimants.

116 Questions in behalf of the United States.

Question 1st. What is your name, age, residence, and occupation?

Ans. Louis Cammann; 33 years; Union City, Alameda county; keeper of saloon.

2. Do you know Augustin Alviso, and how long have you known him, if yea?

Ans. I know him by sight, and have known him in this way since 1852.

3. Did you know Tomas Pacheco in his lifetime?

Ans. Yes.

4. Look upon the official plat of the survey filed in this case, and state if you know the two islands or knobs, marked thereon "D. E. Salmon" and "Wm. Brown?"

(Claim'ts object to the use of the term "island" as leading, and because there is nothing on the official plat representing island.)

Ans. I do recognize them.

117 5. How long have you known them?

Ans. Since 1852.

6. Did you ever live on either of them; if yea, on which one?

Ans. The one marked "D. E. Salmon" on the official plat.

7. When did you first occupy it?

Ans. In October, 1853.

8. How long did you remain there?

Ans. Till the latter part of January, 1854.

9. To whom, if anybody, did you surrender the possession?

Ans. I delivered such possession as I had to Wm., Daniel Salmon's brother.

10. How long have you known Daniel Salmon to occupy this knob?

Ans. He first went there in the fall of 1854.

11. Does he now reside on it?

118 Ans. Yes.

12. Have you ever known him to abandon it?

Ans. I knew he was absent at one time, leaving it in charge of some one. He did not take his house away.

13. From your personal knowledge, do or do not ordinary high tides flow around the two knobs spoken of?

(Objected to as immaterial, irrelevant, and leading.)

Ans. They do by the way of the sloughs making into the land.

14. In ordinary high tides can you go around these knobs with a common row-boat?

(Same objection.)

Ans. I went around it with a skiff.

15. Could you go from the knob on which Salmon now lives, and did live in the fall of 1854, upon the main land without using a boat, before the bridge was built?

119 Ans. You could not without jumping the slough which could be done.

(The whole of the foregoing deposition objected to by claimants as being immaterial and irrelevant.)

Deposition closed.

LOUIS CAMMANN.

Sworn and subscribed to before me this 4th day of April, A. D., 1861.

BLAIR LAURIE,
Special Commissioner.

Endorsed: Filed April 4, 1861.

W. H. CHEVERS, Clerk.

Dep. of J. G. Chipman on part of U. S.

In the district court of the United States for the northern district of California.

The United States	In land cases.—
v.	Dist. court No. 119.—
Thomas Pacheco et al.	Land com. No. 258.

Be it remembered that on this 4th day of April, A. D. 1861, at San Francisco, in the district aforesaid, before me, Blair Laurie, a commissioner duly appointed by the district court of the United
120 States for the northern district of California, to take depositions of witnesses in behalf of the United States in land cases pending in said court, personally appeared John S. Chipman, a witness produced in behalf of the United States in the above-entitled cause, now pending in said court, under the acts of Congress to ascertain and settle the private land claims in the State of California, who, being duly sworn, testified as follows:

Present: U. S. att'y for U. S.; Sidney Johnson, esq., for claimants.

Questions in behalf of the United States.

Question 1st. What is your name, age, residence, and occupation?

Ans. John S. Chipman; of lawful age; San Leandro, Alameda county; attorney-at-law.

2. Are you acquainted with the claimants in this case, or either of them?

Ans. I first knew Agustin Alviso in 1852, and have known him ever since, and knew Pacheco at the same time, and up to the time of his death.

121 3. State if you ever had any conversations with the claimants, or either of them, or ever heard any conversation of them, or either of them, being present yourself, concerning the boundaries of the rancho in question. If so, state what they were, and when and where you heard them.

(Objected to as irrelevant and hearsay; also, that the claimants had granted their interest in that part of the claim which is the subject of contention, and could not be heard themselves against their own could not be heard themselves against their own grant.)

Ans. In 1853 or 1854, I think in 1853, I was standing upon the northern extremity of the cerritos, upon the slough that divided the cerritos from the "knob," marked on the official plat "D. E. Salmon," with Augustin Alviso and others. I proposed to him to cross the slough to do some business upon this Salmon "knob." He said, "No; this slough is my boundary. I don't claim the island." I was replevying wild oats that had been cut upon the

cerritos, and, as I supposed, upon this Salmon
122 "knob." I was replevying for Alviso. I was replevying this wild oats on the ground that it had been cut upon his ground by trespassers. I was acting as attorney for Alviso in connection with the sheriff's officers. Having replevied the oats cut upon the northern extremity of the cerritos, and seeing some had been cut upon this "knob," I proposed to cross the slough to take the oats cut upon the "knob" marked, on the official plat, "D. E. Salmon;" and it was then and there that Alviso made the remark spoken of in the first part of this answer.

4. State the character of the two pieces of land delineated upon the official plat of the survey, filed in this case as hills—one marked "Wm. Brown," the other "D. E. Salmon"—relative to the surrounding lands and the tides of the bay.

Ans. These two pieces, marked upon the plat "D. E. Salmon" and "Wm. Brown," are two pieces of up dry land, containing each about from 60 to 80 acres. I should think Salmon's piece contained 60 or 70 acres; the other, I should think, con-
123 tained about 90 acres.

They are surrounded by sloughs and salt marsh each, and whether the high tides flow around both or either of them, I am unable to say.

On the bay side of the line from the mouth of the Alameda creek to and along the Cerritos, and between that line and the main waters of the bay, there is at least one league of salt marsh. On the

side of the main land, and adjacent to and about these two pieces spoken of, and within the line of survey, there are two square miles of salt marsh altogether.

(The whole of the foregoing testimony objected to on the ground of its being immaterial and irrelevant.)

JOHN G. CHIPMAN.

Sworn and subscribed to before me this 4 day of April, A. D. 1861.

BLAIR LAURIE,
Special Com'r.

Endorsed: Filed April 4, 1861.
W. H. CHEVERS, Clerk.

124 Dep. of Thos. Canfield on part of the U. S.

In the district court of the United States for the northern district of California.

The United States v. Thomas Pacheco et al. — In land cases.— Dist. court No. 119.— Land com. No. 258.

Be it remembered that on this 4 day of April, A. D. 1861, at San Francisco, in the district aforesaid, before me, Blair Laurie, a commissioner duly appointed by the district court of the United States for the northern district of California, to take depositions of witnesses in behalf of the United States in land cases pending in said court, personally appeared Thomas Canfield a witness produced in behalf of the United States in the above-entitled

cause, now pending in said court under the acts of Congress to ascertain and settle the private land claims in the State of California, who, being duly sworn, testified as follows:

Present: U. S. att'y for U. S.; Sidney Johnson, esq., and W. Carey Jones, for claimants.

Questions in behalf of the United States.

125 Question 1st. What is your name, age, residence, and the occupation?

Ans. Thomas Canfield; 41 years; Livermore's valley, Murray township, Alameda county; herding cattle and sheep.

2. Do you know Agustin Alviso; and if so, how long have you known him?

Ans. I do; and have known him since 1857.

3. Do you know what is called the Pacheco and Alviso claim?

Ans. I do not.

4. Look upon the official plat of the survey filed in this case, and state if you know the places thereon marked "D. E. Salmon" and "Wm. Brown."

Ans. I do know them, and have lived on one—"Salmon's"—and have been on the other.

5. When did you live on the one you speak of as Salmon's?

Ans. In 1857.

6. At whose instance, if anybody's, did

126 you go there?

Ans. I went there at Mr. Salmon's invitation.

7. Was he then living on that island or knob?

(Objected to, because the use of the term island is leading.)

Ans. Yes.

8. Had he a house on it, and family?

Ans. He had a house there, but his family was not there at that time.

9. Did you ever hear Agustin Alviso say anything, if so, what, in relation to his claim to the "knobs" before referred to?

(Objected to, because Augustin Alviso had parted with his interest in all that part of the claim referred to in the question before witness knew him, and could not be heard himself against his own grant; and further objects because the testimony is hearsay.)

Ans. No, sir; I always supposed it to be 127 government land.

10. After you knew the "knob," and Augustin Alviso, did he, or did he not, suggest to you to squat on it?

(Same objection as to what Alviso said, and as leading.)

Ans. Yes; he wanted me to squat on the one marked on the official plat "Wm. Brown."

11. On that occasion what did Alviso say?

(Objected to as being cross-examination, and also for same reasons that the preceding questions were objected to.)

Ans. He said I could go and squat on it and no one would trouble me.

12. On that occasion, or any other, did he speak of the boundary of his land or claim on the side of the "knobs?"

(Same objection.)

Ans. I don't recollect—it has been so long ago.

Deposition closed.

THOMAS CANFIELD.

Subscribed and sworn to before me this 4 day of April, A. D. 1861.

BLAIR LAURIE,
Special Commissioner.

128 Endorsed: Filed April 4, 1861.

W. H. CHEVERS, Clerk.

Dep. of Emery Munzon on part of U. S.

In the district court of the United States for the northern district of California.

The United States	In land cases.—
v.	Dist. court No. 119.—
Tomas Pacheco et al.	Land com. No. 258.

Be it remembered that on this 4 day of April, A. D. 1861, at San Francisco, in the district aforesaid, before me, Blair Laurie, a commissioner duly appointed by the district court of the United States for the northern district of California, to take depositions of witnesses in behalf of the United States in land cases pending in said court, personally appeared E. Munzon, a witness produced in behalf of the United States in the above-entitled cause, now pending in said court under the acts

of Congress to ascertain and settle the private land claims in the State of California, who, being
129 duly sworn, testified as follows:

Present: U. S. att'y for the U. S.; S. Johnson, esq., for the claimants, Wm. C. Jones, for claimants.

Questions in behalf of the United States.

Question 1st. What is your name, age, residence, and occupation?

Ans. Emery Munzon; 38 years, Washington township, Alameda county; farmer.

2. How long have you resided there?

Ans. Since the 7th July, 1852.

3. Do you know Agustin Alviso?

Ans. I do.

4. How long have you known him?

Ans. Since January, 1853.

5. Did you know Thomas Pacheco in his lifetime?

Ans. I did.

6. When did you first know him?

Ans. In January, 1853.

130 7. Is he dead?

Ans. He is.

8. How long a time ago did he die?

Ans. I am not positive; 3 or 4 years ago.

9. Where did he reside in his lifetime?

Ans. In Washington township.

10. Where does Agustin Alviso reside?

Ans. In Washington township.

11. Do you know what is called the Alviso and Pacheco claim, in that township?

Ans. I do.

12. Does Alviso reside upon a portion of that claim now?

Ans. He does.

13. Did Tomas Pacheco, in his lifetime, reside upon a portion of it?

Ans. He did.

14. Have you at any time, resided with
131 Augustin Alviso, or upon his part of the claim?

Ans. I never did.

15. Have you any knowledge of a division of the claim between Pacheco and Alviso, verbal or otherwise?

(Objected to because a verbal division would be null, and parol evidence would not be the best proof of any other division.)

Ans. I have seen papers of a division between Alviso and Wm. Carey Jones and T. B. Strode.

(Answer objected to as not being the best evidence; also objected to by W. C. Jones.)

16. Did you ever hear a verbal agreement between Alviso and Pacheco in reference to a division of the claim?

Ans. I never did.

17. Did you at any time have a conversation with Agustin Alviso, touching the boundaries of the claim between his residence and the mouth of Alameda creek?

(Objected to because it is hearsay evidence,
132 and because Alviso, the person referred to, parted with his interest in the claim upon that side before the witness became acquainted with him,

and that grantor cannot be heard to the prejudice of his own grant.)

Ans. I have had conversations with him in regard to the boundaries of his grant, but never heard him say anything about the mouth of Alameda creek in connection with the boundaries.

18. Did you ever hear him say whether the islands, as they appear upon the official plat of the survey filed in this case, (the points to which I allude are marked "Wm. Brown," and the other "D. E. Salmon,") were or are within the boundaries or not?

(Objected to for the same reason as to ques. 17; and also because the official plat of the survey does not show that any islands are embraced in it.)

Ans. I never heard Alviso say he claimed them as being within his boundaries. I heard him say that he ordered a Peruvian to squat on one of 133 them—the one marked "Wm. Brown."

(Objected to as incompetent and irrelevant.)

19. Are you well acquainted with those islands or knobs, and the surrounding land and waters?

(Objected to because the official plat does not show that there are any islands embraced within the boundaries.)

Ans. I am.

20. How long have you known that locality?

Ans. I have known it since 1853.

21. Does or does not high tide water flow around the knobs above referred to?

(Objected to as leading.)

Ans. It does.

22. Are you acquainted with the slough laid down on official plat of survey filed in this case; passing by the knob marked "D. E. Salmon?"

Ans. I am.

23. About what is its average width along
134 Salmon's "knob?"

Ans. About 200 feet.

24. How far, if at all, above knob marked "D. E. Salmon" is that slough navigated by trading vessels, by its courses?

Ans. I could not say; about ½ or ¾ of a mile on a direct line from the knob to the embarcadero.

25. How much, by the best estimate you can make, salt or marsh ground (looking on the official plat of survey) lies between the line of the survey that runs upon the bay side of the "knobs" and the main waters of the bay?

(Objected to because it does not appear that witness is an expert or competent to judge of the matters submitted to him in the question.)

Ans. About 4 square miles.

26. How much, by the best estimate you can make, (looking on the plat aforesaid,) salt or marsh land lies inside of the "knobs" in a direction of Union City and Alvarado?

(Same objection.)

Ans. About 2 square miles.

135 27. Looking upon said plat, how much, if any, salt or marsh land lies between the cerito and the main waters of the bay?

(Same objections; also objected to because the plat does not show where the main waters of the bay are.)

Ans. From 3 to 4 square miles.

Cross-examination by claimants.

28. You state you live in Washington township. Say in what particular part of it; describe the locality.

Ans. Two miles west of Centerville, near the residence of Agustin Alviso.

29. How long did you live in that locality?

Ans. Since the 1st day of January, 1853.

30. Where did you live previous to that time?

Ans. Near Maury's landing—about 3 miles south of my present residence, a little east of south—on the land marked on official plat "Lands of the
136 ex-mission of San Jose."

31. You state, in answer to ques. 15, that you have seen papers of a division between Alviso and Wm. Carey Jones and T. B. Strode. State the character of those papers, their contents, in what manner they were executed, and what they describe?

Ans. They were papers in Spanish, recorded in Santa Clara county, stating that a portion of the rancho known as Cerritos, lying south of a callado or ditch and a sausal or willow swamp, should be the portion pertaining to Augustin Alviso. I can give the boundaries nearly word for word as the papers described them. From the willow swamp, where the ditch ends, the line to run to a point in the sausal or willow swamp, in direction to Union

City; from this point of this willow grove in the nearest direction to the high hills; from the foot of the hills along the edge of said hills to the bay of San Francisco, leaving all said hills for the benefit of said Augustin Alviso; thence along said bay to the mouth of the Arroyo Alameda; then up said arroyo to the place of beginning.

I think that the papers were acknowledged before Murphy. I think that Alviso and Strode were
137 the ones that signed the paper. I think Strode signed for W. Jones as his attorney.

32. Are you familiar with the Spanish language?

Ans. Sufficiently to read and converse on ordinary business.

33. Please repeat in Spanish the boundaries you have described in answer to question 31.

Ans. Empezando á la punta del vallado cerca onde se junta con el Arroyo de Alameda cerca la casa de Don Tomas Pacheco siguinedo dicho vallado hasta que junta con el sauzal, donde se conclude: de alli, si sigue á la punta del sauzal en direccion á Union City, de este sauzal en direccion mas corta á las lomas altas; de alli se sigue la orilla de dichos lomas á la bahia de San Francisco, y por la orilla de dicho bahia á la boca del Arroyo Alameda, y arriba por el Arroyo Alameda hasta se llegue al vallado donde se empezo.

138 34. Did you ever see the original of those papers you have described, and when, if so?

Ans. I saw a paper in the possession of Alviso, purporting to be the original, somewhere from 3 to 5 years ago.

35. How do you know the paper was recorded in Santa Clara county?

Ans. Alviso sent me to get a certified copy of the record of it from the clerk of the county of Santa Clara. I got it there.

36. State the name of the office of the person who gave you that certified copy, and the date of it, and where it is now?

Ans. I think his name was Healey. He was the county clerk in the city of San José. It was dated at the time he delivered me the copy, some 3 to 5 years ago. I delivered it to Augustin Alviso at that time. I don't know where it is now.

37. Have you ever had any interest in any 139 lands either which this survey would favor or operate against?

Ans. No; I have not, nor ever had.

38. What consideration did Agustin Alviso pay you for going to San José and procuring the certified copies that you speak of?

Ans. Not a cent.

39. Were you promised, or do you expect, any consideration for it?

Ans. He promised to pay me for my day's work, and the cost of the trip.

Deposition closed.

EMERY MUNZON.

Subscribed and sworn to before me this 4th day of April, A. D. 1861.

BLAIR LAURIE,
Special Commissioner.

Endorsed: Filed April 4, 1861.

W. H. CHEVERS, Clerk.

140 Intervention of H. P. Jones

In the district court of the United States for the northern district of California.

The United States

v. No. 119.

Thomas Pacheco et al.

Northern District of California, ss:

H. P. Jones, being sworn, says that he is the owner of a certain portion of the said rancho, embraced within and designated by certain boundaries, a large portion of which is embraced within the limits of the survey made of said rancho by the surveyor general of the United States, containing by estimate one thousand acres, more or less; that he holds said premises by virtue of mesne conveyances from the original grantees and confirmees of said rancho, Thomas Pacheco and Augustin Alviso, and that for more than two years last past he has been in quiet and peaceable possession of said premises under his said title.

Petitioner further deposes and says, that he has an interest in the survey of said rancho as
141 returned into this court by the surveyor general of the United States, and prays that he may intervene herein for the protection of his said interest as above mentioned.

H. P. JONES.

Sworn and subscribed to before me this 10th day of April, A. D. 1861.

W. H. CHEVERS, U. S. Com.

E. A. LAWRENCE,
And WM. CAREY JONES,
Att'ys for Petitioner.

Endorsed: Filed April 10, 1861.
W. H. CHEVERS, Clerk.

Dep. of E. H. Dyer on part of U. S.

In the district court of the United States for the northern district of California.

The United States	In land cases.—
v.	Dist. court No. 119.—
Tomas Pacheco et al.	Land com. No. 258.

Be it remembered that on this 11th day of June, A. D. 1861, at San Francisco, in the district aforesaid, before me, Blair Laurie, a commissioner duly appointed by the district court of the United
142 States for the northern district of California, to take depositions of witnesses in behalf of the United States in land cases pending in said court, personally appeared E. H. Dyer, a witness produced in behalf of the United States, in the above-entitled cause, now pending in said court, under the acts of Congress to ascertain and settle the private land claims in the State of California, who, being duly sworn, testified as follows:

Present: U. S. att'y for U. S.

Questions in behalf of the United States.

Question 1st. What is your name, age, residence, and occupation?

Ans. E. H. Dyer; 39 years; Alvarado, Alameda county; county surveyor of Alameda.

2. Have you made a map or chart of the point land lying between Alameda creek and the Bay of San Francisco?

Ans. I have.

3. Did you make so much map or chart as a surveyor?

Ans. I did.

142. 4. Is the exhibit marked E. H. D., attached to this deposition, the one made by you and above referred to, and is it a correct delineation of the lands referred to?

Ans. It is one, and is substantially correct.

5. Is the line on this plat, which purports to be the westerly line of the rancho of the Cerritos on said map, a true representation of that line as laid down on the plat of the U. S. survey?

Ans. It is.

6. Do you know if the knobs, which appear upon said exhibit like islands, are surrounded by high tide-water?

Ans. They are marked on my exhibit, Peruvian and Hunter island, and they are surrounded by high tide-water.

7. How much salt land lies between the westerly line of the survey of said rancho, and the main waters of the bay?

Ans. Between 7 and 8 square miles.

144. 8. How much salt land of the same character lies between said westerly line and the Alameda creek?

Ans. Between 3 and 4 square miles.

9. Does the black line marked upon Exhibit E. H. D. show the true line between the salt and dry land?

Ans. It was not all made by actual survey; part of it was, and the rest from observation, and I think it is substantially correct.

10. Do you know of an artificial ditch from the Alameda creek to the willows, or at a point by Patterson's residence?

Ans. I know there is such a ditch.

11. Where does it leave Alameda creek, with reference to Pacheco's old residence, and in what direction from that point does the ditch run. And does it cross the old mission road from Alvarado?

Ans. Judging from its course, I should think it left Alameda creek near the house. It runs
145 in a westerly direction, crossing the road from Alvarado to the mission to the willows, and I should think it would strike about Patterson place at the willows.

12. Do you know the place where the U. S. surveyor has located the line of this rancho in the direction of Santa Clara?

Ans. I do not.

13. Do you know the serpentine indentation in the land from Mayhew's landing, leading towards the Alameda creek, passing through Centreville?

Ans. I do.

14. Is that a natural or artificial indentation in the land?

Ans. It has the appearance of being natural, not artificial—produced apparently by an overflow of the Alameda creek.

15. Can you say whether what purports to be the upper line in the direction of Santa Clara,
146 delineated on the official plat of the survey in this case, represents a natural or artificial ditch?

Ans. I should think it represents a natural ditch.

Deposition closed.

E. H. DYER.

Subscribed and sworn to before me this 11th day of June, 1861.

BLAIR LAURIE, Com'r.

Endorsed: Filed 11 June, 1861.

W. H. CHEVERS, Clerk.

(Here follows Exhibit E. H. D., annexed to dep. of E. H., Dyer, page 146.)

147 Dep. of Wm. J. Lewis, on part of claim'ts.

In the district court of the United States for the northern district of California.

The United States — In land cases.—
v. — Dist. court No. 119.—
Tomas Pacheco et al. — Land com. No. 258.

Be it remembered, that on this 28th day of April, A. D. 1862, at the city of San Francisco, in the

district aforesaid, before me, Wm. H. Chevers, a commissioner duly appointed by the circuit court of the United States for the districts of California to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil

No. 251 – U. States v. Sachs et al
p. 146

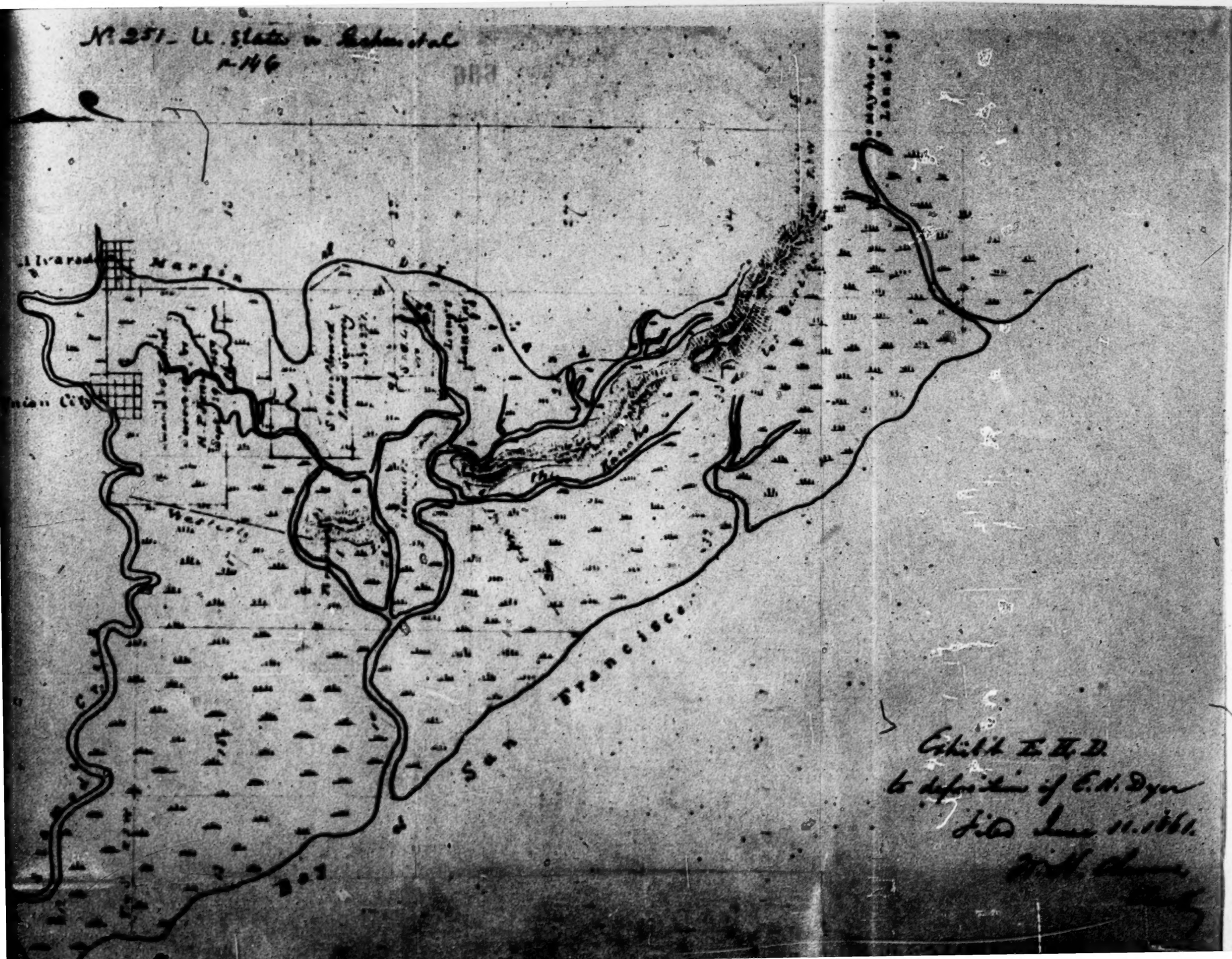


Exhibit E. H. D.
to deposition of E. H. Dyer
Filed June 11. 1861.
[illegible]

causes depending in the courts of the United States, pursuant to the acts of Congress in that behalf, personally appeared William J. Lewis, a witness produced in behalf of the claimant in the above-entitled cause, now pending in said court under the acts of Congress to ascertain and settle the private land claims in the State of California, who, being duly sworn, testified as follows:

Present: J. J. Williams and Sidney L. Johnson, esq'r's, for claimant, and E. H. Laurence, esq., for Intervenor Jones et als.

148 Questions in behalf of the claimant.

Question 1st. What is your name, age, place of residence, and occupation?

Ans. My name is Wm. J. Lewis; my age is fifty years. I reside in San Francisco, and am by occupation a civil engineer and surveyor.

2. Are you the same Wm. J. Lewis who made the official survey in this case, the plat of which is now before you?

Ans. I am.

3. Was there any difficulty in this case in ascertaining the northern, eastern, and southern boundaries of the ranch, as defined in the original grant and final decree of confirmation?

Ans. There was not. The Alameda creek is a well-known stream, formerly the boundary between Santa Clara and Contra Costa counties, and running from the mountains to the bay. The Sanjon de los Alisos is a wide ditch, running from Alameda creek to a slough on the margin of the swamp
149 lands adjacent to the bay of San Francisco;

it is unmistakably defined on the ground, and is well known to the residents in the vicinity.

4. Upon what principles were you governed in running the western line?

Ans. The boundary, as finally confirmed on the western side, is "the bay of San Francisco," and the contents of the rancho is "about three square leagues." Under the regulations of the land office and the general instructions of the U. S. surveyor general of California, the claimants are entitled to select the specified quantity of land within their boundaries. When I arrived in the order of survey at "post 175," at Beard's Embarcadero, Augustin Alviso stated that he did not desire that I should include any of the swamp land to the westward of the range of hills marked "Los Ceritos," but did wish to include that range. I accordingly ran the line along the western base of that range to "post 211," at the northern end of the hills. The property north of that point, and extending to Alameda creek, was sold several years since to Strode, Jones, and others, whose interest in the survey were represented by Hezekiah P. Jones, brother of Wm. Carey Jones, one of the original purchasers from Pacheco and Alviso. The said H. P. Jones wished to include the two little ceritos to the north and northwestward of the range already mentioned. The line was accordingly run from post 211 to post 212, at the west end of the most eastern of the two ceritos; thence to post 213, at the southern end of the western cerito; thence along its western margin to post 218, at its northwestern end; thence

150

in a direct line to post C. R. 1, the place of beginning, on Alameda creek. I calculated the area of the survey, and finding that there were two thousand seven hundred and four acres less than the area confirmed in this case, (three leagues,) I informed Mr. Jones that he was at liberty to select that quantity of land to the westward of my western lines, and between them and the bay. He said
151 he did not desire the possession of that land, that he considered it of very little value. The land from post 212 to 213 crosses salt marsh of the ordinary character of the salt marshes surrounding the bay. These marshes are genderally at the elevation of ordinary high tides, but are overflowed twice a month, at the new and full moon. The same remark applies to the general character of the line from post 218 to post C. R. 1; but on that line there are some points where ordinary tide passes a little to the eastward of the line, where small sloughs run up into the main land.

5. Are the two small ceritos referred to by you properly called or considered "islands?"

Ans. They are not properly called islands, an island being a tract of land surrounded by water, and these are evidently surrounded by water but a small portion of the whole time.

6. Look upon the diseños in this case marked "18 S. D. K.," and "31, S. D. K.," and ob-
152 serve the slough making up into the main land from the estero, and state with what slough or object it corresponds on the ground.

Ans. On both diseños they are undoubtedly intended to represent the slough which crosses the

western line between posts 211 and 212. This slough extends up a long distance to the eastward, forming in its upper part a sausal or willow swamp. No other between that and Alameda creek extends much if any distance into the higher land.

7. Did you ever make a prior survey of this land? If so, state when, for whom, and for what purpose.

Ans. I made a survey of Strode and Jones's purchases from Alviso in 1853. Their purchases did not embrace a portion of the land to the eastward, which was leased by Beard and Horner of Alviso, but I made a survey of the whole of the western part, extending westward of the lines from post 212, and the lines from post 212 to C. R. 1, and extending from these lines to the margin
153 of the bay, and including the two little ceritos. This survey was of Strode and Jones's portion of the ranch, and Mr. Alviso was present while I was making the survey along the northern margin of the sausal until I came running westerly to the slough. The eastern boundary of one part of the Jones and Strode survey was a ditch running from the Alameda creek, near Tomas Pacheco's house, to the sausal, excepting a small reservation on the creek; the remaining portion of their purchase was a tract bounded on the westward by the ditch, on the south by the road leading from Union City to the mission of San José, and on the north and east by the boundaries of the rancho.

The latter part of the answer, commencing with the words "The eastern boundary of one part of

the Jones and Strode survey," etc., was in answer to a question verbally propounded by Mr. Lawrence, counsel for int'r Jones et al.

Cross-examination. Deposition closed.

WM. J. LEWIS.

154 Sworn to and subscribed April 28, 1862, before me.

W. H. CHEVERS, U. S. Com.

Endorsed: Filed May 15, 1862.

W. H. CHEVERS, Clerk.

Dep. of Jas. T. Stratton, on part of claim'ts.

In the district court of the United States for the northern district of California.

The United States v. Tomas Pacheco et al. — In land cases, dist. court, No. 119.— Land com. No. 258.

Be it remembered that on this 28th day of April, A. D. 1862, at the city of San Francisco, in the district aforesaid, before me, Wm. H. Chevers, a commissioner duly appointed by the circuit court of the United States for the districts of California to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the courts of the United States,

155 pursuant to the acts of Congress in that behalf, personally appeared Jas. T. Stratton, a witness produced in behalf of the claimant in the above-entitled cause, now pending in said court under the acts of Congress, to ascertain and settle the private land claims in the State of California, who, being duly sworn, testified as follows:

Present: J. J. Williams, esq., and Sidney L. Johnson, esq., for claimant; and E. A. Laurence, esq., for int'rs Jones et als.

Question 1st. What is your name, age, place of residence, and profession?

Ans. My name is James T. Stratton; I am of lawful age; I reside in Alameda county, and my profession is that of surveyor.

2. Did you ever hold any office in Alameda county; if so, what and how long?

Ans. I was deputy county surveyor from 1853 to 1859, and have been county surveyor for two years, and have also been a U. S. deputy
156 surveyor.

3. Do you know the rancho claimed in this case?

Ans. I do know it well.

4. Look upon the diseñor in this case, marked "18, S. D. K." and "31, S. D. K." and observe the slough making up into the main land from the estero, and state with what slough or object it corresponds on the ground?

Ans. It corresponds on the ground with the slough shown on the copy plat of official survey, filed in this case, crossing eastwardly into the main land, at the southerly side of the cerito, on which is marked "D. E. Salmon."

Cross-examination.

Questions by counsel for intervenors Jones et al.

Ques. 5. State what is the character of the land between the slough last referred to and the beginning post, and designated as marsh land.

Ans. It is of the usual character of the
157 salt marsh land surrounding the bay of San Francisco, and is generally but two or three inches above ordinary high tide, and is only overflowed during spring tides.

6. State the character of the two ceritos, marked Brown and D. E. Salmon, with reference to the main land.

Ans. They are isolated hills, surrounded by the salt marsh above described; they are sometimes called islands, but not properly so, because they are only surrounded by water at the spring tides.

Deposition closed.

JAS. T. STRATTON.

Subscribed and sworn to this 28th day of April, A. D. 1862, before me,

W. H. CHEVERS, U. S. Com.

Endorsed: Filed May 15, 1862.

W. H. CHEVERS, Clerk.

158 Dep. of Salvio Pacheco, on part of claim't.

In the district court of the United States for the northern district of California.

The United States v. Tomas Pacheco et al. In land cases, dist. court, No. 119.— Land com. No. 258.

Be it remembered, that on this 29th day of April, A. D. 1862, at the city of San Francisco, in the district aforesaid, before me, Wm. H. Chevers, a commissioner duly appointed by the circuit court of the United States for the districts of California to take acknowledgments of bail and affidavits, and

also to take depositions of witnesses in civil causes depending *in civil causes depending* in the courts of the United States, pursuant to the acts of Congress in that behalf, personally appeared Salvio Pacheco, a witness produced in behalf of the claimant in the above-entitled cause, now pending in said court under the acts of Congress to ascertain and settle the private land claims in the State of California, who, being duly sworn, testified as follows: his evidence being interpreted by Manuel Arrisa, jr., a sworn interpreter.

159 Present: J. J. Williams, esq., and Sidney L. Johnson, esq:. for claimant, and E. A. Laurence, esq., for intervenors Jones et als.

Questions in behalf of the claimant.

Question 1st. What is your name, age, and place of residence?

Ans. My name is Salvio Pacheco; my age is over sixty years; and I reside in the county of Contra Costa.

2. Do you know the rancho claimed in this case, called Potrero de los Ceritos?

Ans. I do.

3. Do you know by whom the original *diseño* was made for Alviso and Pacheco?

Ans. I myself made the *diseño* and petition.

4. From what did the rancho take its name?

Ans. From the "*Rinconado de* Ceritos" and the Arroyo Alameda.

5. Do you know the two small ceritos, rep-
160 resented on the official plat in this case, between the slough and the Alameda creek?

Ans. I do.

6. Do you know whether or not those two ceritos were included in the grant and diseño to Pacheco and Alviso?

Ans. They were in both the diseño and grant, and I think in the petition for the grant.

7. Were the said *ceritos* used and occupied by the original grantees, if so, how?

Ans. Originally they were used and occupied by the mission, and after the petition of Pacheco they were always occupied by Pacheco and Alviso. They were used for the purpose of pasturing hogs, sheep, and cattle, and they contained very good grasses.

Cross-examination waived. Deposition closed.

SALVIO PACHECO.

Subscribed and sworn to this 29th day of April, A. D. 1862, before me.

W. H. CHEVERS, U. S. Com.

161 Endorsed: Filed May 15, 1862.

W. H. CHEVERS, Clerk.

Dep. of Guillermo Castro, on part of claim't.

In the district court of the United States for the northern district of California.

The United States	In land cases.—
v.	Dist. court No. 119.—
Tomas Pacheco et al.	Land com. No. 258.

Be it remembered that on this 29th day of April, A. D. 1862, at the city of San Francisco, in the district aforesaid, before me, Wm. H. Chevers, a commissioner duly appointed by the circuit court of

A
Alameda
ALVARADO
E.C. Smith
C.B. Strode & William Carey Jones Esqr 4655 Acres
Tompkins Jones & Stroude
1980 Acres
277 Acres
Sausal
BAY OF SAN FRANCISCO
Survey ed April 1853
by William J Lewis
County Surveyor

SUPREME COURT OF THE UNITED STATES

I, Charles Elmore Cropley, Clerk of the Supreme Court of the United States, do hereby certify that the foregoing photostatic pages, numbered from one to fourteen, inclusive, contain a true copy of extracts from the transcript of the record in the case of

The United States, App'ts.,

vs.

Tomas Pacheco, et al.,

No. 251, December Term, 1864, as the same remains upon the files of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Washington, this first day of April, A. D. 1932.

[Seal] CHARLES ELMORE CROPLEY,
Clerk of the Supreme Court of the United States.
By REGINALD C. DILLI,
Deputy.

WITNESS continuing: The notice of the completion of the Freeman Survey, published by Surveyor General Robbins, pursuant to Section I of the Act of July 1, 1864, was offered in evidence.

Mr. KELBY: We make the same objection that we have heretofore made.

The COURT: Overruled and exception.

(The document was received in evidence as "Plaintiff's Exhibit Y".)

PLAINTIFF'S EXHIBIT Y

[Endorsed]: Filed May 3, 1932, United States District Court.

Filed: Jun. 18, 1934, United States Circuit Court of Appeals.

Advertisement of the Freeman Survey as it appeared in the Daily Alta California on November 8, 1877, page 4, bottom of Col. 5; and on October 11, 1877, page 2, top of Col. 4.

"U. S. Surveyor-General's Office, San Francisco, Cal., October 10th, 1877.—Notice—

In compliance with the first section of an Act of Congress, approved July 1st, 1864, regulating surveys of Private Land Claims, notice is hereby given that the following survey thereof has been made, viz: Isla de la Yegua or Mare Island, finally confirmed to George W. Bissell and Wm. H. Aspinwall. Surveyed by Jas. E. Freeman, Deputy Surveyor, in July, 1877. Containing 5227 22 100 acres. The plats will be retained in this office, subject to inspection, for ninety days from the date of the first publication hereof. H. G. Rollins, U. S. Surveyor-General.

Oc 11 th 5"

Mr. PECKHAM: I offer in evidence a photostat of the Life of Sawyer from Page 655, History of Solano and Napa Counties, also a letter dated February 12, 1853, from John P. Kennedy, Secretary of the Navy, to Honorable A. H. Stuart, Secretary of the Interior, also letter from John Wilson, the Commissioner of the General Land Office, to

Samuel D. King, Surveyor General at San Francisco, also letter from John Wilson, Commissioner of the General Land Office, to James C. Dobbin, Secretary of the Navy, dated April 30, 1853, also the ap- [251] pointment by H. G. Rollins of James E. Freeman, to make a survey, also the Certificate of Publication of the Notice (Plaintiff's Exhibit Y), also copy of a letter from General Ames to J. A. Williamson, Commissioner of the General Land Office, dated November 5, 1877, also a voucher, No. 99960, dated November 5, 1877.

Mr. KELBY: Same objection as made to the previous exhibit and also on the further ground that the survey, the map of which has just been entered in evidence, has not been shown to have had the approval of the General Land Office or the Interior Department of the United States.

The COURT: Objection overruled and exception.

(The documents were received in evidence as "Plaintiff's Exhibit Z".)

PLAINTIFF'S EXHIBIT Z

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
WASHINGTON

"B" March 21, 1932

H. E. R.

I hereby certify that the annexed copies of letters, papers, plat and blue print, filed under "Mare

Island" are true and literal exemplifications of the originals and records on file in this office, in my custody.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal] (Signed) D. H. PARROTT,
Acting Assistant Commissioner of the
General Land Office.

J. W. Ames,
U. S. Surveyor General

J. Robinson
Chief Clerk

U. S. SURVEYOR-GENERAL'S OFFICE
CALIFORNIA
Commercial St., above Montgomery
(Up Stairs)

Official letters, etc., pertaining to the business of the office, should be addressed to the "U. S. Surveyor-General's Office, Post Office Box No. 2260." Be particular to describe the land you write about, by Section or parts of Section, Township and Range.

San Francisco, Nov. 5th, 1877.

Hon. J. A. Williamson,
Comr. Gen'l Land Office,
Washington, D. C.

Sir:

I have the honor to transmit herewith, tracing for account, also account of Jas. E. Freeman, Dep. Surveyor for surveying Isla de la Gegua or Mare

Island (confirmed to Geo. W. Bissell and Wm. H. Aspinwall) executed under his contract of June 28, 1876, amounting to $404.94 payable from the appropriation for the survey of Private Land Claims in Cala. during the fiscal year ending June 30, 1876.

Very respectfully,

J. W. AMES,

U. S. Sur. Gen'l for Cala.

M

No. 99960

J. W. AMES,

U. S. Surveyor-General for California

Date, Nov. 5th, 1877

SUBJECT:

Transmitting tracing for account, also acct. of Jas. E. Freeman for surveying Isla de la Gegua or Mare Island, amounting to $404.94 payable from appropriation for the survey of Private Land Claims, during the fiscal year ending June 30, 1876.

Ans. Nov. 16, 1877.

Referred to Division E

Received (G. L. O.) Nov. 14, 1877.

Theo. Wagner
U. S. Surveyor General

J. A. Robinson,
Chief Clerk

U. S. SURVEYOR GENERAL'S OFFICE
California
No. 610 Commercial Street,
Post Office Box No. 2260

San Francisco, Aug. 7th, 1879

Hon. J. A. Williamson,
Commn. Gen'l Land Office,
Washington, D. C.

Sir:

In reply to your letter "E" of 25th ult., directing this office to forward a certified copy of the decree of confirmation by the U. S. District Court in the case of the claim of G. W. P. Bissell and Wm. H. Aspinwall for Mare Island I have the honor to state that although it appears from the records of the court that a decree of confirmation was ordered to be entered on the 2nd day of March, 1857, no such decree can be found.

I inclose herewith a copy of the plat of survey and field notes of Freeman's survey made in July, 1877, Copy of Instructions to Freeman to survey said island, Copy of the Certificate of Advertisement, Copy of the Decree of Confirmation by the U. S. Board of Land Commissioners; Copy of a certificate from the Clerk of the U. S. District Court with extracts from the minutes in the case; and a Protest filed in this office July 14, 1879, by Bernard T. Hanley, Esq., of Washington City as attorney for owners.

I consider the survey incorrect in that it not only includes tracts which are properly islands in themselves but also embraces a large quantity of tide land, and should be limited to the area contained south of a line run across the island from the vicinity of Station No. 54 to Station No. 138.

Very respectfully,
Your obdt. serv't,
THEO. WAGNER,
U. S. Sur. Gen'l.

No. 38,856

THEO. WAGNER
U. S. Surveyor-General for California
Date Aug. 7, 1879

SUBJECT:

Transmitting Copy of Plat of Survey and Freeman's field notes of Survey of "Mare Island"—

Also Certificate of Advertisement, etc., and states reasons for disapproving survey.

See letter from the Secretary of the Navy dated Aug't 4, 1879. Filed. See to Secy. Int. Sept. 22, 1905 relative to making further survey under direction of G. L. O.

See 1343798.

Referred to Division E.

Received (G. L. O.) Aug. 18, 1879.

8 papers

No. 307

George W. Bissell, et al.

vs.

The United States.

In this case after hearing the proofs and allegations it is adjudger of commission that the claims of the said petitioners here in is valid and it is therefore decreed that their application for a confirmation there of be allowed.

The place of which confirmation is hereby given is situate in the Bay of San Francisco and is called "Isla de la Yegua" or Mare Island, and being an Island is bounded by the waters edge.

R. AUG. THOMPSON,
S. B. FARWELL,
Commissioners.

[Endorsed]: No. 307. G. W. Bissell et al. Isla de la Yegua. Decree of Confirmation. Filed in office May 8, 1852, Geo. Fisher, Secy. Recorded in Record of Decisions Vol. 2, page 647, Geo. Fisher, Secy.

OFFICE OF THE SURVEYOR-GENERAL,
Of the United States, for California.

I, T. WAGNER, Surveyor-General of the United States for the State of California, DO HEREBY CERTIFY, that the page preceding, and hereunto annexed, is a full, true and correct copy of a certain instrument of writing now of record and on file in

this office, and in my custody; that I have carefully compared the same with said original, and that the same is a correct transcript therefrom, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially, and caused my Seal of Office to be affixed, at the City of San Francisco, this sixth day of August, 1879.

THEO. WAGNER,
U. S. Surveyor-General for California.

311

The United States,

vs.

G. W. P. Bissell & W. H. Aspinwall.

"Ysla de Yegua, or Mare Island"

October 13, 1855—Filed Transcript from U. S. Land Com., in case No. 307.

Feby. 1, 1856—Filed Notice of Appeal from Atty. Genl.

March 2, 1857—Filed Decree of Confirmation.

April 1, 1857—Filed Order granting Appeal.

I, Southard Hoffman, clerk of the District Court of the United States for the District of California, do hereby certify the foregoing to be a full, true and correct copy of the Register entries in the case of the United States v. G. W. P. Bissell & W. H. Aspinwall No. 311 in said court, and I further certify that on the Minutes of said Court for the 2nd day of March, 1857, an entry appears enumerating

a number of cases among which is the case of the United States vs. Bissell & Aspinwall to which the following minute is appended "Decree of confirmation was entered in each of these cases by consent of the United States Dist. Attorney." And after due and diligent search I have been unable to find any Decree of Confirmation on file or of record in said case.

Attest my hand and seal of said District Court, this 4th day of August A. D. 1879.

SOUTHARD HOFFMAN,
Clerk U. S. Dist. Court of Dist. Cal.

OFFICE OF THE SURVEYOR-GENERAL,
Of the United States, for California.

I, T. WAGNER, Surveyor-General of the United States for the State of California, DO HEREBY CERTIFY, that the page preceding, and hereunto annexed, is a full, true and correct copy of a certain instrument of writing now of record and on file in this office, and in my custody; that I have carefully compared the same with said original, and that the same is a correct transcript therefrom, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially, and caused my Seal of Office to be affixed, at the City of San Francisco, this Sixth day of August, 1879.

THEO. WAGNER,
U. S. Surveyor-General for California.

U. S. Surveyor-General's Office,
San Francisco, Cal.
July 19th, 1877.

James E. Freeman,
U. S. Deputy Surveyor.

Sir:—

Whereas, it appears by a certified copy of a decree placed on file in this office, that the claim of George W. Bissell and William H. Aspinwall to a tract of land named Isla de la Yegua, or Mare Island, has been finally confirmed by The Commission for ascertaining and settling the Private Land Claims in California, and by the U. S. District Court for the Northern District of Cal.

And Whereas, application has been made, by the interested parties, for a survey and location of said claim, I have thought proper to appoint you my Deputy in this special case, for the execution of the Survey thereof.

Agreeably to the decree in the matter, the claim herein referred to is confirmed in favor of the said claimants, to the following effect: "The place of which confirmation is hereby given is situate in the Bay of San Francisco, and is called Isla de la Yegua, or Mare Island, and being an Island is bounded by the water's edge."

Section 7 of the Act of Congress of July 1st, 1864, provides:

> "That it shall be the duty of the Surveyor-General of California, in making Surveys of the Private Land Claims finally confirmed, to

follow the Decree of Confirmation as closely as practicable, whenever such decree designates the specific boundaries of the claim; but when such decree designates only the out-boundaries within which the quantity confirmed is to be taken, the location of such quantity shall be made, as near as practicable, in one tract and in a compact form. And if the character of the land, or intervening grants, be such as to render the location impracticable in one tract, then each separate location shall be made, as nearly as practicable, in a compact form."

You will therefore make your Survey in accordance with the requirements of the law, and said Decree of Confirmation.

You will therefore accurately ascertain and properly measure, run and mark the exterior boundaries of the claim, and restrict it to the confirmed quantity.

In all other respects you will comply with the printed instructions of this office, dated April 9th, 1864, a copy of which is herewith inclosed for your information and guidance.

[Seal] H. G. ROLLINS,
U. S. Surveyor-Gen'l, California.

Duplicate

U. S. Surveyor General's Office

San Francisco, Cal., Aug. 6, 1879.

A full, true and correct copy of the original as the same remains of record and on file "in duplicate" in this office.

Attest: THEO. WAGNER,

U. S. Sur. Gen'l

INSTRUCTIONS.

July 19th, 1877

RANCHO

Isla de la Yegua,

or Mare Island

Jas. E. Freeman,

Dep. Surveyor.

U. S. SURVEYOR GENERAL'S OFFICE

San Francisco, January 18, 1878.

I HEREBY CERTIFY, that by virtue of the provisions of the Act of Congress, approved 1st July, 1864, entitled "An Act to Expedite the Settlement of Titles to Lands in the State of California," notice of the plat and survey having been made of the rancho Isla de la Yegua, or Mare Island, finally confirmed to George W. Bissell & Wm. H. Aspinwall, surveyed by Jas. E. Freeman, U. S. Deputy Surveyor, in July, 1877, has been advertised in accordance therewith in two newspapers, to-wit: the Vallejo Evening Chronicle published in the County of Solano, State of California, being near to where the said land is located; the

first publication being on the 11th day of October, 1877, and the last on the 8th day of November, 1877; also in the Alta California a newspaper published in the City and County of San Francisco, State aforesaid; the first publication being on the 11th day of October, 1877, and the last on the 8th day of November, 1877. And that the plat of said survey was retained in this office subject to inspection during all of ninety days, and until the expiration thereof from the date of the first publication.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially, and caused my seal of office to be affixed in the City of San Francisco, this 18th day of January, 1878.

[Seal] I. W. AMES,
U. S. Surveyor General for California.

U. S. SURVEYOR GENERAL'S OFFICE
San Francisco, Cal., Aug. 6, 1879.

I hereby certify that the foregoing is a full, true and correct copy of the original record of publication in the case of the survey of Mare Island as the same appears of record and on file in this office.

Attest: THEO. WAGNER,
U. S. Sur. Gen'l.

O. 38.856. E. 5
MARE ISLAND
Copy Record of
Advertisement.

FIELD NOTES
OF
The survey of "Isla de la Yegua" or
"Mare Island."
Situated in Sonoma County, State of California
Granted by Juan B. Alvarado to
Victor Castro May 20th, 1841.
Finally confirmed to
Geo. W. Bissell & William H. Aspinwall,
by the U. S. District Court, March 2d, 1857.
Surveyed by James E. Freeman.
Date of Contract June 28th, 1876.
Date of Instructions July 19th, 1877.
Survey commenced July 24th, 1877.
Survey completed August 1st, 1877.

PRELIMINARY OATH OF ASSISTANTS.

I,.....do solemnly swear that I will well and truly perform the duties of Compassman, according to instructions given me, and to the best of my skill and ability.

.....

Subscribed and sworn to before me, this.....day of.....187...

.....
U. S. Deputy Surveyor

We, DANIEL SCULLY and N. W. BREW do solemnly swear that we will faithfully execute the

duties of Chain Carriers; that we will level the chain upon uneven ground, and plum the tally pins, whether by sticking or dropping the same; that we will report the true distance to all notable objects, and the true length of all lines; that we will assist in measuring, to the best of our skill and ability.

his
DANIEL X SCULLY
mark
N. W. BREW,

Subscribed and sworn to before me, this 24th day of July, 1877.

C. W. REILLY,
Justice of the Peace,
Vallejo, Solano Co., Cal.

I, Thomas Dixon do solemnly swear that I will well and truly perform the duties of Flagman according to instructions given me, and to the best of my skill and ability.

THOMAS DIXON

Subscribed and sworn to before me, this 24th day of July, 1877.

C. W. REILLEY,
Justice of the Peace,
Vallejo, Solano Co., Cal.

I, John Charlton, do solemnly swear that I will faithfully execute the duties of chain carrier or flagman according to the best of my skill and ability.

JOHN W. C. CHARLTON.

Sworn and subscribed to before me this 25th day of July, 1877.

CHAS. W. RILLEY,
Justice of the Peace in and for Vallejo,
Township—Solano Co., Cala.

In order to connect the survey of Mare Island with a section corner of the Public Land Survey's, I begin at the quarter sec. corner, bet. secs. 13 & 18, Ranges No. 3 & 4 West. Township No. 3 North, Mt. Diablo base & Meridian and run South 120 chains to the cor. of secs. 19, 24, 25 & 30.

Now commencing at the water edge on the Easterly side of Mare Island, West of the Sec. corner set a post 4 x 4 x 40 inches marked S. 24 & 25 bears West 25 links distant standing by a prominent flag pole of the U. S. Coast Survey.

July 24th, 1877.

Thence along the water's edge at ordinary high water mark.

Var. 16° 15' E.

1	S. 40° E.	23.90	The cor. of secs. 19, 24, 25 & 30 on main land brs. N. 46° E.
		31.40	
2	S. 27½° E.	12.70	S. E. cor. of Magazine brs. West 50 lks.
		15.00	

3	S. 40¼°	E.	3.50	
4	S. 36½°	W.	3.50	
5	S. 69°	W.	7.50	
6	S. 16°	E.	3.70	
7	S. 13¼°	W.	2.50	
8	S. 41°	W.	2.60	
9	S. 75°	W.	1.60	
10	S. 86½°	W.	5.00	
11	S. 30°	W.	4.20	
12	S. 85½°	W.	2.00	
13	S. 62°	W.	8.10	Light House 2 chs. North.
14	N. 54°	W.	40.00	
15	S. 80°	W.	2.30	
16	S. 86½°	W.	3.50	
17	N. 74½°	W.	3.60	
18	N. 66½°	W.	2.70	
19	N. 33°	W.	1.90	
20	N. 87°	W.	1.00	
21	N. 48½°	W.	1.84	
22	N. 47½°	W.	10.50	
23	N. 77°	W.	2.50	
24	S. 55°	W.	2.50	
25	N. 43½°	W.	1.00	
26	N. 31°	W.	29.00	
27	N. 60½°	W.	3.20	
28	S. 77°	W.	2.90	
29	N. 5°	W.	4.50	
30	N. 23½°	W.	4.30	
31	N. 31°	E.	1.20	
32	N. 33½°	W.	4.70	
33	N. 25°	W.	3.30	
34	N. 32½°	W.	10.00	
35	N. 25½°	W.	26.10	S. W. Cor. of Barracks brs. N. 44 E.
				July 25th, 1877.
36	N. 4½°	E.	2.00	
37	N. 24°	W.	5.50	
38	N. 30°	E.	3.30	
39	N. 31½°	E.	2.20	
40	N. 17°	E.	5.40	S. W. cor. of Barracks brs. S. 75° E.

41	N. 31°	W.	6.00	
42	N. 40°	W.	4.00	
43	N. 50½°	W.	3.30	
44	N. 83½°	W.	2.00	
45	N. 16°	W.	2.70	
46	N. 43°	W.	1.90	
47	N. 14°	W.	1.70	
48	N. 72½°	W.	1.40	
49	N. 18½°	W.	5.60	
50	N. 10°	W.	7.00	
51	N. 26½°	W.	7.00	
52	N. 19°	E.	4.20	
53	N. 22°	W.	6.00	To Tide Lands thence along Tide Lands.
			12.00	
54	N. 34°	W.	24.00	
55	N. 40°	W.	44.00	
56	N. 52°	W.	44.00	
57	N. 61°	W.	64.00	
58	N. 64°	W.	36.00	
59	N. 70°	W.	196.00	
60	N. 61°	W.	40.00	
61	N. 62°	W.	15.00	
62	N. 58¼°	W.	25.00	
63	N. 67°	W.	13.50	
64	N. 86¼°	W.	4.00	A fishermans cabin 1 ch. North.
				July 26th, 1877.
65	N. 50½°	W.	7.50	
66	N. 79½°	W.	18.00	
67	N. 55°	W.	5.00	
68	N. 81°	W.	23.00	
69	N. 67½°	W.	10.00	Leaves San Pablo Bay.
			"	To mouth of Sonoma Creek comes from N. W.
70	N. 63¼°	W.	40.00	
71	N. 23¼°	W.	8.00	Point of Land at the confluence of the Huichica Slough & Sonoma Creek brs. N. 50° W. about 10 chs. dist. Thence along Huichica Slough.

72	N. 26¾°	E.	4.50	
73	N. 63½°	E.	11.50	
74	N. 87½°	E.	23.00	
75	N. 87°	E.	41.00	
76	East		11.50	
77	S. 74½°	E.	40.00	
78	S. 85½°	E.	10.70	
79	N. 75¼°	E.	9.50	
80	N. 60½°	E.	18.00	To a point opposite the junction of South or "Navy Yard" Slough with "Middle Napa" Slough, thence up South or Navy Yard Slough.
81	S. 36°	E.	2.30	
82	S. 1½°	W.	7.00	
83	S. 5°	W.	11.70	
84	S. 6½°	E.	7.50	
85	S. 37°	E.	7.00	July 27th, 1877.
86	S. 75½°	E.	4.00	
87	East		6.70	To the Westerly Mouth of Montgomery Slough crs. S. E. 2 chs. wide.
88	N. 41°	E.	4.00	
89	N. 35½°	E.	12.00	
90	N. 22°	E.	12.50	
91	N. 3½°	E.	26.00	
92	N. 10°	W.	22.00	
93	N. 56½°	E.	5.00	
94	S. 65½°	E.	20.00	
95	S. 78°	E.	4.00	
96	N. 87½°	E.	11.00	
97	S. 61°	E.	1.50	
98	S. 52°	E.	4.40	
99	S. 3½°	E.	5.50	
100	S. 15°	W.	10.40	
101	S. 6¼°	W.	8.00	
102	S. 8°	E.	11.00	
103	S. 30°	E.	8.50	To Easterly Mouth of Montgomery cut off or slough crs. S. W.
			9.98	Over same.

104	S. 74½°	E.	20.00	
105	East		21.00	
106	N. 56¼°	E.	12.50	
107	N. 23¼°	E.	8.00	
108	N. 11½°	E.	8.50	
109	N. 63½°	E.	9.00	
110	N. 60½°	E.	6.58	
111	S. 63¾°	E.	13.76	
112	N. 64½°	E.	12.60	
113	N. 82°	E.	3.18	July 28th, 1877.
114	S. 23¾°	E.	2.18	
115	S. 25½°	W.	4.47	
116	S. 61¾°	W.	8.94	
117	S. 35½°	W.	28.13	
118	S. 10¾°	W.	9.60	
119	S. 33°	E.	23.20	
120	S. 15°	E.	16.14	
121	S. 51½°	E.	14.56	
122	S. 77¾°	E.	10.53	
123	N. 75¼°	E.	17.90	
124	N. 43½°	E.	39.50	
125	N. 60½°	E.	11.92	
126	S. 73°	E.	4.97	
127	S. 9°	E.	23.55	Boat cut off or Dutchmans slough 1 ch. wide.
128	S. 46¾°	E.	23.76	
129	S. 65½°	E.	34.00	
130	N. 89°	E.	56.56	Leave Navy Yard or South Slough and enter creek.
131	S. 78½°	E.	17.10	
132	S. 9½°	W.	60.00	
133	S. 4½°	E.	42.70	To South Easterly mouth of Boat Cut off or Dutchmans slough 6 chs. wide co. N. W.
134	S. 13¾°	W.	13.91	
135	S. 16½°	E.	40.50	
136	S. 31½°	E.	23.11	
137	S. 42½°	E.	24.60	
138	East		23.21	To the Northerly cor. of Machine Shop.
				" Leave Tide Lands.
				July 29th, 1877.

139	S. 40½°	E.	28.50	
140	S. 24½°	E.	8.63	To Ferry Boat Wharf co. N. E. & S. W.
			14.00	To Dry Dock.
			33.15	
141	S. 42°	E.	37.42	
142	S. 38°	E.	33.46	
143	S. 19°	E.	6.45	To the place of beginning.

Containing 5227-22/100 acres

GENERAL DESCRIPTION

With the exception of a narrow strip of land on the Easterly side of the Island, all that portion where the Navy Yard is situated extending Southerly from the Machine shop, is high dry ground rising gradually towards the South.

At the Southerly end of the Island the bluffs appear to be about 200 ft. in height—soil generally first rate.

That portion extending North Westerly from the Machine shop, is tide or swamp land producing tule & other salt marsh grasses.

The "Boat Cut off" known also as "Dutchmans slough" is about 60 lks. wide near its Westerly end —widening out towards the South Easterly end to 8 or 10 chains.

The South or Navy Yard slough varies in width from 6 to 10 chains.

The Northern boundary is entered by numerous small sloughs, which ramify this portion of the Island in every direction. Owing to the action of the tides all the sloughs are very broad at their entrance but narrow rapidly as they extend inland. Sailing vessels of Light Draught can pass around

are Island by way of South or Navy Yard slough. Several Iron Monuments are erected near the ater's edge along the Northern boundary with no-es thereon forbidding persons to trespass on the nds, as they are claimed by the U. S. Government. August 1st, 1877.

JAS. E. FREEMAN

WE DO HEREBY CERTIFY, that we assisted as. E. Freeman, U. S. Deputy Surveyor, in survey-g the boundary lines of the Rancho Isela de la egua or Mare Island situated in the County of noma in the State of California, and finally con-med to Geo. W. Bissell & William H. Aspinwall, d that said Rancho has been in all respects, to e best of our knowledge and belief, well and faith-lly surveyed, and the boundary monuments estab-hed according to the laws of the United States, d the instructions of the Surveyor-General.

.....Compassman,

N. W. BREW Chainman,

JOHN W. C. CHARLTON Chainman,

His

DANIEL X SCULLY Axeman,

mark

THOMAS DIXON Flagman.

Subscribed and sworn to before me this 1st day August, 1877.

CHAS. W. RILLEY,

Justice of Peace

Vallejo—Solano Co., Cala.

I, Jas. E. Freeman, U. S. Deputy Surveyor, do solemnly swear that, in pursuance of instructions from H. G. Rollins, U. S. Surveyor-General for the State of California, bearing date the 19 day of July, 1877, and in strict conformity to the laws of the United States and the said instructions from the Surveyor-General, I have well and faithfully surveyed the boundary lines of the Rancho Isla de la Yegua or Mare Island situated in the County of Sonoma in the State of California, and finally confirmed to Geo. W. Bissell & William H. Aspinwall and I do further solemnly swear that the foregoing are the true and original field notes of said survey.

JAMES E. FREEMAN,
U. S. Deputy Surveyor.

Subscribed by said Jas. E. Freeman, U. S. Deputy Surveyor, and sworn to before me, a U. S. Commr. in and for the County of San Francisco in the State of California, this 29th day of Aug., 1877.

J. A. ROBINSON,
U. S. Commissioner.

U. S. Surveyor General's Office,
San Francisco, Cal., Aug. 6, 1879.

I hereby certify that the foregoing transcript has been correctly copied from the original field notes as the same remain of record and on file in this office.

Witness my hand and official seal the day and year in this certificate written.

THEO. WAGNER
U. S. Sur. Gen'l.

General Land Office

October 12, 1852.

Samuel D. King, Esq.,
Surveyor General of California,
San Francisco, Cal.

Sir:

Your letter of 19th August last has been received. You state that "While in many cases the margins of the tide waters of this State consist of Bluff banks, yet in some portions of the State, especially about the Bay of San Francisco and the mouths of its tributary streams, there is frequently a wide strip of low ground between the main land and the Bay, etc., subject in whole or in part to overflow and frequently greatly cut up by narrow, but sometimes deep bayous or Channels; and local circumstances will, in some instances, render such low grounds valuable. In surveying the public lands and private claims, it therefore, becomes important that the principles which are to govern the action of this Office, so far as such lands are concerned should be settled by the Department," and you therefore request "instructions as to the proper position of the meander lines in such cases," by my stating "whether they shall be run to correspond with the limits of ordinary high tides, or go to the usual low water line."

In reply to the foregoing inquiry you are informed that the public surveys, under the circum-

stances set forth, are to be so ordered that their lines shall include, at least, the ordinary low water mark—the surveys so situated purport to have a water boundary and one to which peculiar value may be attached, and therefore the meanders are to be so ordered that no pretext shall hereafter exist for claims to any land on the water line, in front of the surveyed lines.

The principles laid down in these instructions were overruled in the case of U. S. v. Pacheco by the Supreme Court 2 Wallace p. 587.

You further enquire as follows—"Also where a claim under either of the former governments calls for the Bay, or other tide water, as one of its boundaries, is the land occasionally, or periodically covered by water, and beyond the line which is to be considered as the front line of the tract, liable to be surveyed and appropriated as public land, or must it be considered as appurtenant to the claim to the main land and therefore exempt from all action upon the part of this Office"?

In the survey of private claims whose calls are as aforesaid, the same principles must be made to govern as in the case of public surveys—the lands which are "periodically or occasionally covered by water", are to be considered and treated as within the limits of such claims and not "beyond the line which is to be considered as the front line of the tract," and to this end the front of the tract must be meandered, as in the case of the public land

under the former enquiry, so as to include the lands "periodically or occasionally covered by water"; otherwise the question of right to strips of land found "beyond the line which is to be considered as the front line of the tract," and which may hereafter become of a highly appreciated value, may not be regarded as having been finally disposed of under the surveying instructions, but claimed to be treated as an open question, subject to judicial determination which may be attended with troublesome consequences in the future, and hence the proper procedure is so to meander as to prevent any doubt hereafter.

I am very respectfully,
Sir, Your Ob't Serv't,
JOHN WILSON,
Commissioner.

P. S. Where the progress of the lines of the public surveys is interrupted by Swamps, the surveyed line will be made to terminate at the Swamp and the outlines of the Swamp will be meandered and exhibited on the plats of Survey.

J. WILSON.

See letter July 15, 1859 interdicting the meandering.

General Land Office
February 16, 1853.

Samuel D. King, Esq.,
Surveyor-General,
San Francisco, California.

Sir:

Herewith are transmitted copies of two communications, one from the Honble Secretary of the Navy dated 9th inst. in reference to the proposed reservation under the provisions of "The 3rd Section of the Act of last Session, Chap. CIX, Statutes at large, making appropriations for the Naval Service", whereby the Secretary of the Navy is authorized and directed to select a site for a Navy Yard and "Naval Depot in the Bay of San Francisco, in California or neighboring waters either by purchase or reservation of public lands,"—in pursuance whereof the Secretary of the Navy recommends that the President "give the necessary orders to that end, and direct that the tract of land in the Bay of San Francisco, bounded by the Bay of San Pablo, the Straits of Carquinez and Napa Creek, known as Mare Island, together with all its appendages of Tule or Marsh land

J. M. M. See letter to the Secretary of the Navy Feby. 16th, 1853. Receipt of this instruction ackd. by L. Ransom, Esq., Actg.-S. Gen'l of Cal. in his letter of Mar. 31st, 1853. Advised the Secy. of the Navy of the fact 30th Apl. '53.

MARE ISLAND Reservation for Naval purposes.

ordinarily reputed to belong to said island, and the harbors, waters and anchorages connected therewith and necessary to the use of the same, be reserved to the United States for public uses,"— Whereupon the President has directed as follows:

"Washington, Febr'y 11, 1853.

The reservations above recommended are hereby made, and the Secretary of the Navy will communicate that fact to the appropriate department that the reservation may be properly and legally recorded."

(Signed) "Millard Fillmore".

The other communication, herewith transmitted, is a copy of a letter from the Hon. Secretary of the Navy to the Hon. Secretary of the Interior, dated 12th ins't, both of which have been referred by the latter to this office, for the necessary action to be taken thereon.

The island alluded to will be found enumerated amongst the reservations for public uses made by the President and communicated in the letter from this Office to you on the 24th June 1851.

You will please to record these orders of reservation and advise this Office of your having so done. They are recorded in this Office in the California letter book under the date hereof.

The sheet of Ringgold's Charts showing the position of the Island alluded to, which was transmitted to this Office with the Communication referred to, is herewith transmitted. I hope shortly to be en-

abled to furnish you with a number of sets of the charts published by that officer.

Very respectfully
Your Ob't Serv't
JOHN WILSON,
Commissioner.

Navy Department
February 9th, 1853.

Sir:

By the 3rd Section of the Act of last Session, Chapter CIX. Statutes at large, making appropriations for the Naval Service, the Secretary of the Navy is "authorized and directed to select a site for a Navy Yard and Naval Depot in the Bay of San Francisco, in California, or neighboring waters either by purchase or reservation of public lands."

I have the honor to inform you that acting in pursuance of this authority, I have it in contemplation to select Mare Island, in the Bay of San Francisco as the site for the Navy Yard and Depot referred to in the above act.

Negotiations have been in progress for the purchase of this island and its appendages for some time past. An investigation of the title which has been offered to the United States by those claiming to own this island, has led to some doubt whether the Government does not already possess the paramount right to the occupation and use of the island. My own opinion is that whether the title shall be

found to exist in the United States, or not, it is proper that the Government should reserve the land for public use and thus assert a title which will, at least, serve to strengthen any other which may ultimately be purchased.

The Act of Congress above referred to, authorizes the reservation, if it may be thought expedient to make it, in case this land should belong to the public domain.

I have therefore respectfully to ask, if you should concur in the propriety of making the reservation, that you will be pleased to give the necessary orders to that end, and direct that the tract of land in the Bay of San Francisco bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island, and the harbors, waters and anchorages connected therewith and necessary to the use of the same, be reserved to the United States for public uses.

You will find accompanying this note a Map or Chart of the said tract called Mare Island, which will indicate its position in the Bay of San Francisco, and the waters connected therewith.

I have the honor to be

With the highest respect

Your Ob't Serv't

JOHN P. KENNEDY.

To the President.)

Washington, February 11, 1853.

The reservations above recommended are hereby made, and the Secretary of the Navy will communicate that fact to the appropriate Department, that the reservation may be properly and legally recorded.

MILLARD FILLMORE.

Navy Department

February 12th, 1853.

Sir:

I have the honor to enclose herewith a letter addressed to the President from this Department under date of the 9th inst. asking him to give the necessary orders and to direct that the tract of land in the Bay of San Francisco bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island, and the harbors waters and anchorages connected therewith and necessary to the use of the same, be reserved for Public uses. And the President having made the reservation and instructed me to "communicate that fact to the Appropriate Department, that the

See Commr. letter to Secy. of Navy, Feby. 11, 1853 and instructions to Sur. Gen. of California, ante, same date.

See Commr. letter to Sec. of the Navy. Apl. 30th, 1853.

reservation may be properly & legally recorded," as will appear by his order of the 11th instant added by him to the letter from this Department herein before mentioned. I respectfully request that the necessary order and notice may be given to effect the reservation of the said tract of land, known as Mare Island, in the Bay of San Francisco, in California, and that this Department may be advised when the necessary forms shall be completed.

I have the honor to be
Very respectfully,
Your Ob't Serv't
JOHN P. KENNEDY.

Hon. A. H. H. STEWART,
Secretary of the Interior.

General Land Office
February 16, 1853.

Hon. John Kennedy
Secretary of the Navy.

Sir:

Your letter to the Ho. the Secretary of the Interior, dated 12 inst. communicating the order of the President of the States for the reservation, for Naval purposes of "the tract of land in the Bay of San Francisco, bounded by the Bay of San Pablo, the Straits of Carquinas and Napa

See letter to Secy. of the Navy, Apr. 30,

1853 stating that the order had been recorded in the Sur. Gen'l. Office at San Francisco, as per advices dated 31 Mar. '53 and 29th Apl. 1853.

I. M. M.

Creek known as Mare Island, together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island; and the harbors, waters and anchorages connected therewith and necessary to the use of the same," has been referred to this Office for the purpose of having the necessary action taken thereon.

The order of the President has been duly recorded in this Office, and a copy thereof, together with a copy of your letter to the Secretary of the Interior, has been addressed to the Surveyor General of California (and which will be mailed for the Steamer which is expected to sail on the 20 inst.) with instructions to him, to have the same also recorded in his Office.

In this connection I would also beg leave to recur to the fact that there is enumerated amongst many other reservations, for public uses, of lands in California ordered to be reserved and exempted from sale by the President formerly, the island ("Mare") alluded to, and that such order was communicated to the Surveyor General of California by letter dated 24th Jan. 1851.

I have the honor to be

With great respect

Your Ob't Serv't

JOHN WILSON,

Commissioner.

General Land Office

April 30, 1853.

Hon. I. W. C. Dobbin,

Secretary of the Navy.

Sir:

In my letter to your Department dated the 16 February last, it was stated that the order of the President for the reservation of "MARE" island in the Bay of San Francisco (therein described) for Naval purposes, had been recorded in this Office, as desired by the Department, and been transmitted to the Surveyor General of California to be also recorded in *his* office at San Francisco.

I. M. M.

A communication has just been received from the "Acting Surveyor General" of California, acknowledging the receipt of the aforesaid instructions, and stating that the order for the reservation of said Island for the purpose desired, had been duly recorded in his Office.

I have the honor to be with great respect

Your Ob't Serv't

JOHN WILSON,

Commissioner.

Department of the Interior
General Land Office

J. W. D.

Washington, D. C., Nov. 16, 1877.

J. W. Ames, Esq.,
U. S. Surveyor General,
San Francisco, Cala.

Sir:

The surveying account of Jas. E. Freeman, amounting to the sum of $404. 94/100 received with your letter of the 5" inst. is transmitted to the Treasury for payment on this day with request that draft be sent to payee in care of your office.

Yours respectfully,
J. A. WILLIAMSON,
Commissioner.

Department of the Interior
General Land Office

J. E.

Washington, D. C., July 25, 1879.

Theo. Wagner, Esq.,
Surveyor General,
San Francisco, Cala.

Sir:

You are requested, immediately upon the receipt hereof, to forward to this Office a copy of the final confirmation of Mare Island to G. W. P. Bissell and Wm. P. Aspinwall, by the District Court, said confirmation bearing date March

Mare Island
291

2, 1857. Also description of limits. Has the Island been surveyed?

Very respectfully,
J. M. ARMSTRONG,
Acting Commissioner.

Department of the Interior
General Land Office

N. F.

Washington, D. C., Aug. 7, 1879.

Theodore Wagner, Esq.,
U. S. Surveyor General,
San Francisco, California.

Sir:

Referring to letter from this Office dated the 25th ultimo, requesting information upon the subject of Mare Island in California, I have also to request that if there is in your office a plat and notes of the survey of said Island, made or approved by government officers, you will cause to be prepared and forwarded to this Office a copy of such survey.

285
Mare Island

Very respectfully,
J. M. ARMSTRONG,
Acting Commissioner.

Mr. PECKHAM, continuing: We next offer letter of the Commissioner of the General Land Office, W. A. Richards, dated September 22, 1905, letter from Acting Secretary Ryan to the Secretary of the Navy.

The COURT: The same objection, Mr. Kelby.

Mr. KELBY: The same objection, to which is to be added the further objection that all this has been overruled and abandoned by the Interior Department and the Land Office.

The COURT: Overruled and exception.

(The document was received in evidence as "Plaintiff's Exhibit Z-1".)

PLAINTIFF'S EXHIBIT Z-1.

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Washington

April 15, 1932.

I hereby certify that the annexed copies of letters, filed under 2996-1905 L & R R, are true and literal exemplifications of the originals and records on file in this office in my custody.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this

office to be affixed, at the city of Washington, on the day and year above written.

[Seal] THOS. C. HAVELL,
Assistant Commissioner of the General Land Office.

2996-1905
L. & R. R. Div. 9/28/05

The Secretary of the Navy.

Sir:

In a letter of the 9th instant to the Department the Acting Secretary of the Navy stated that, in connection with the suit instituted by E. H. Sawyer questioning the ownership by the Government of certain lands heretofore regarded as lying within the limits of the United States Navy Yard, Mare Island, California, it is desired to ascertain definitely the position of certain section lines which ought to be extended to determine the limits of the property in controversy.

With this end in view he requested that, if such action can be appropriately taken, instructions be issued directing the early survey of the lands.

The letter, with its enclosures, was referred to the Commissioner of the General Land Office with instructions to take action as requested and report in the premises to the Department.

In answer to the letter I have the honor to enclose a copy of the report thereon by the Commissioner under date of the 22nd instant.

The report sets forth the facts shown by the records of the General Land Office relating to the acquisition of Mare Island by the United States by purchase of the entire area thereof, based on the

survey executed by the Board of Officers of the United States, sent to California presumably by the Navy Department.

In view of the facts covered by the report, the Commissioner has expressed the opinion that his office has no authority to survey any land in the locality described, as it is not public land of the United States.

I concur in the report of the Commissioner and return herewith the enclosures in the letter of the Acting Secretary of the Navy.

Very respectfully,

.....,

Acting Secretary.

1905-114650

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Washington, D. C., September 22, 1905.
Address Only the
Commissioner of the General Land Office.

Subject:—Relative to instructing the U. S. Surveyor General to survey lands within the limits of the Mare Island Navy Yard, California.

The Honorable,
The Secretary of the Interior.

Sir:—

I am in receipt, by your reference of September 13, 1905, of a letter dated September 9, 1905, from the Acting Secretary of the Navy, addressed to you,

inclosing a letter dated August 19, 1905, from H. H. Rousseau, Civil Engineer, U. S. N., addressed to the Commandant, Navy Yard, Mare Island, California, recommending that the Secretary of the Interior authorize the U. S. Surveyor General of California to survey certain section lines in Township 3 North, R. 4 W., M. D. M., California, within the limits of the Mare Island Navy Yard, embracing "Tide Land Survey No. 34", and inclosing two blue prints showing in red the approximate location of the land included in said Tide Land Survey No. 34, and a letter from the U. S. Surveyor General of California, dated August 12, 1905, in reply to his communication of August 10, 1905, in which the Surveyor General states that only a small portion "of the public land lines in T. 3 N., R. 4 N., M. D. M., required for your purpose" have been surveyed by the Government, and that:

> "The section lines referred to in Tide Land Survey No. 34, Solano County, are projections from the lines and corners described in the above mentioned field notes, surveyed, if ever by the surveyor making said Tide Land Survey."

In the letter from Mr. Rousseau, above described, reference is made to a suit instituted by E. H. Sawyer in the case of Sawyer vs. McCalla, which is expected to come to trial in November, and which he states is being brought against the United States by Sawyer, "who questions the Government ownership to Tide Land Survey No. 34, Solano County, and

accretions" lying to the North of the Steam Engineering Buildings, and comprising about 375 acres, which the U. S. Attorney desires to have definitely established; that said Tide Land Survey No. 34 is located and bounded with reference to certain section lines which it becomes necessary to definitely and accurately establish, and it is of considerable importance to the U. S. Attorney, in his defence of said suit,

> "that the section lines referred to in Tide Land Survey No. 34, Solano County, should be projected as soon as possible",

and referring to said blue prints, he calls attention to three corners of the SE¼ of Sec. 10, T. 3 N., R. 4 W., M. D. M., which, he states, "it is desirable to have located in the usual manner prescribed by law, by the Department of the Interior".

The Acting Secretary of the Navy, in his said letter dated September 9, 1905, addressed to you, requests that if such action can be appropriately taken, instructions be issued to the Surveyor General directing the survey of the lands, at the earliest date practicable.

In your note of reference, you direct this office to take the action requested by the Acting Secretary of the Navy, if practicable, and to advise the Department in the matter.

I have, therefore, the honor to report that the official plats of Ts. 3 and 4 N., R. 4 W., M. D. M., California, show that Mare Island is unsurveyed, and the records show that said island was claimed

before the California Land Commission, established by Act of Congress approved March 3, 1851, (9 Stat., 631), by George W. P. Bissell and Wm. H. Aspinwall, under a grant from the Government of Mexico to Victor Castro, he having received a grant to the land by Juan B. Alvarado, May 20, 1841, and it was confirmed to them, (Bissell and Aspinwall), by the Commission, May 8, 1855, and by the U. S. District Court March 2, 1857.

The confirmation by the Commission was by the following description:

> "The place of which confirmation is hereby given is situate in the bay of San Francisco, and is called 'Isla de la Yegua', or Mare Island, and, being an island, is bounded by the water's edge".

The affirmatory decree of the United States District Court is not in this office, and under date of August 7, 1879, the U. S. Surveyor General, in his letter to this office in reply to letter from this office to him, dated July 25, 1879, stated that:

> "Although it appears from the records of the court that a decree of confirmation was ordered to be entered on the 2nd. day of March, 1857, no such decree can be found".

The Surveyor General at that time also transmitted a plat and field notes of the survey of the island executed by James E. Freeman, in July, 1877, under the provisions of the act of Congress approved July 1, 1864, (13 Stat., 332), showing the

area of the island to be 5227.22 acres; also a copy of the instructions to Freeman to survey said island; copy of certificate of advertisement, copy of the Decree of Confirmation by the U. S. Board of Land Commissioners, copy of certificate from the Clerk of the U. S. District Court, and extracts from the minutes in the case, and a protest filed in his, (the U. S. Surveyor's General's), office, July 14, 1879, by Bernard F. Hanley, of Washington, D. C., "as attorneys for owners".

With reference to the survey as executed by James E. Freeman in 1877, the Surveyor General in his letter dated August 7, 1879, states as follows:

> "I consider the survey incorrect in that, it not only includes tracts which are properly islands in themselves, but also embraces a large quantity of tide land, and should be limited to the area contained South of a line run across the island from the vicinity of Station No. 54 to Station No. 138".

Copies of said letter, dated August 7, 1879, from the U. S. Surveyor General and its enclosures, above referred to, were forwarded with letter "E" from this office, addressed to you, dated August 3, 1900, in reply to a letter from the Secretary of the Navy dated July 23, 1900, addressed to you.

The records in this office further show that prior to confirmation of the island to Bissell and Aspinwall, the President by his order, dated November 6, 1850, reserved said island for public purposes, and on February 9, 1853, the Secretary of the Navy

addressed a letter to the President, recommending the reservation as a site for a navy yard and naval depot, of Mare Island, describing the land to be reserved, as follows:

> "The tract of land in the Bay of San Francisco, bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island and harbors, waters and anchorages connected therewith, and necessary to the use of the same".

In response to this recommendation, the President, on February 11, 1853, ordered as follows:

> "The reservations above recommended are hereby made, and the Secretary of the Navy will communicate that fact to the appropriate Department, that the reservations may be legally recorded".

In addition to the foregoing, it is shown that, in reply to a letter from this office dated July 26, 1879, the Secretary of the Navy, under date of August 4, 1879, transmitted a copy of deed dated January 4, 1853, from George W. P. Bissell, Wm. H. Aspinwall, and Mary S. McArthur, to the United States, for the island, in consideration of the sum of $83,491, "to them paid in proportion to their said interests, respectively", and the land is described in copy of deed as follows:

> "All that tract of land and island known as Mare Island, in the Bay of San Pablo, as re-

cently surveyed by the Board of Officers of the United States sent to California for the selection of a site for the Navy Yard there, including all the Tule or low land and marsh belonging to the same, or which has ever been reported or claimed to belong to the same and all the waters, harbors, bays, creeks, and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging, (excepting only as is hereinafter expressed), with the reversion and reversions, remainder and remainders, rents, issues and profits thereof".

Attached to this copy of said deed is also a copy of the opinion of the Solicitor of the Navy Department, dated October 20, 1873, addressed to "Commo. C. R. P. Rogers, Chief of Bureau &c", in which it is stated as follows:—

"During your absence I have examined the enclosed papers. They show a good title in the U. S. to the whole of Mare Island, upland and marsh.

The decision of the Board of Commissioners of the U. S., under the act of March 3, 1851, is final and conclusive as to the title of Bissell, under whom the U. S. now hold.

"If any private claimant is in possession of any part of the island, he should be evicted. If the U. S. have not taken full possession of the island, they should do so without delay".

No further action appears to have been taken in regard to the survey executed by James E. Freeman, above referred to, received with letter from the U. S. Surveyor General dated August 7, 1879, than to endorse on said letter; "See letter from the Secretary of the Navy, dated August 4, 1879", and the letter and its enclosures were placed on file in this office.

The reason that no further action was taken in the matter of executing any further survey under the direction of this office, is obvious. It was shown that the United States purchased the whole of said island as aforesaid, based upon the survey executed by the Board of Officers of the United States, sent to California, presumably by the Navy Department, as enumerated in the copy of deed from Bissell, Aspinwall and McArthur, which survey was deemed sufficient for the purpose of conveying the land.

In view of the foregoing, I am of the opinion that this office has no authority to survey any land in the locality described, for the reason that it is not public land of the United States, the same having been purchased by the United States from the private land claimants aforesaid who derived their title from the Government of Mexico, as stated, and there is no appropriation available out of which the expense of surveying other than public lands of the United States and reservations or abandoned reservations, under the jurisdiction of this office, could be paid.

If any further survey of the land is desired, I respectfully submit that it should be executed under the direction of the Navy Department under whose jurisdiction the land now appears to be.

The papers transmitted by you are returned herewith.

Very respectfully,
W. A. RICHARDS
Commissioner.

WHW.

DEPARTMENT OF THE INTERIOR
Received Sep. 25, 1905
L.&R.R.DIV.

General Land Office
September 22, 1905.
Commissioner

Acknowledges receipt by Department reference of Sept. 13, 1905 of a letter dated August 19, 1905 from H. H. Rosseau, Civil Engineer U. S. N. transmitted with letter dated Sept. 9, 1905 from the Acting Secretary of the Navy requesting that certain surveys within the limits of Mare Island Navy Yard Cala. be made under the direction of this office. Reports in matter, in duplicate, and returns papers as directed.

Letter to Secy. of the Navy
Sept. 28/05

In Reply Address the Secretary of the Navy
and Refer to No. 445-5

NAVY DEPARTMENT,
Washington, September 9, 1905.

Sir:

This Department is in receipt of reports from the navy yard, Mare Island, stating that in connec-

tion with the suit instituted by E. H. Sawyer questioning the Government's ownership of certain lands heretofore regarded as lying within the limits of the yard named, it is desired definitely to ascertain the position of certain section lines which ought to be extended in order to determine the limits of the property in controversy.

From a letter addressed by the Surveyor General for California to the Civil Engineer at the navy yard, Mare Island, under date of August 12, 1905, copy herewith enclosed marked A, it appears that the "public lines referred to" (T. 3 N. R. 4 W.—M. D. M.) have never been surveyed by the Government. See also in this connection two blue prints showing tide land survey No. 34, likewise transmitted (marked, respectively, B and C).

Further information respecting the necessity for the survey of these lands is set forth in a letter, dated August 19, 1905, from H. H. Rousseau, Civil Engineer, U. S. N., (original marked D).

It is requested that if such action can appropriately be taken, instructions be issued to the Surveyor General of the State of California directing the survey of the lands referred to at the earliest date practicable.

I have the honor to be, Sir,

Very respectfully,

THOS. H. DARLING

Acting Secretary.

The Secretary of the Interior.

Navy Secy. Acting

Sept. 9, 1905.

Refers to suit instituted by E. H. Sawyer, and asks that Surveyor General of California be directed to survey at earliest practicable date described lands heretofore regarded as being within the limits of Mare Island Navy Yard, California.

(4 enclosures)

Department of the Interior

September 13, 1905.

Respectfully referred to the Commissioner of the General Land Office with instructions to take the action requested by the Acting Secretary of the Navy, if practicable, and to advise the Department of the action taken.

THOS. RYAN,

Act. Secretary.

U. S. General Land Office, Received Sep. 15, 1905.

September 28, 1905.

The Secretary of the Navy.

Sir:

In a letter of the 9th instant to the Department the Acting Secretary of the Navy stated that, in connection with the suit instituted by E. H. Sawyer questioning the ownership by the Government of certain lands heretofore regarded as lying within the limits of the United States Navy Yard, Mare

Island, California, it is desired to ascertain definitely the position of certain section lines which ought to be extended to determine the limits of the property in controversy.

With this end in view he requested that, if such action can be appropriately taken, instructions be issued directing the early survey of the lands.

The letter, with its enclosures, was referred to the Commissioner of the General Land Office with instructions to take action as requested and report in the premises to the Department.

In answer to the letter I have the honor to enclose a copy of the report thereon by the Commissioner under date of the 22nd instant.

The report sets forth the facts shown by the records of the General Land Office relating to the acquisition of Mare Island by the United States by purchase of the entire area thereof, based on the survey executed by the Board of Officers of the United States, sent to California presumably by the Navy Department.

In view of the facts covered by the report, the Commissioner has expressed the opinion that his office has no authority to survey any land in the locality described, as it is not public land of the United States.

I concur in the report of the Commissioner and return herewith the enclosures in the letter of the Acting Secretary of the Navy.

Very respectfully,

THOS. RYAN,
Acting Secretary.

Mr. PECKHAM, continuing: We next offer in evidence from Page 390 of the Report of Surveyor General of California, found on Page 377 of Executive Documents, Third Session, 45th Congress, 1878-79, Volume 9, the report of the Secretary of the Interior, No. 1.

Mr. KELBY: The same objection.

The COURT: Overruled and exception.

Mr. PECKHAM, continuing: And also the report from Executive Documents of the Third Session, 46th Congress, 1880-81, Volume 9, [252] the report of the United States Surveyor General's Office, of August 10, 1880, commencing at Page 689 of that book, the portion of the report contained in "H", statement of descriptive notes, decrees of Court, etc., continued, Page 751.

Mr. KELBY: The same objection.

The COURT: Overruled and exception.

(The document was received in evidence as "Plaintiff's Exhibit AA".)

PLAINTIFF'S EXHIBIT AA.

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

COPIED FROM REPORT OF U. S. SURVEYOR GENERAL OF CALIFORNIA, DATED AUGUST 22, 1878, PRINTED AS PART OF EXECUTIVE DOCUMENTS, 3rd SESSION, 45th CONGRESS, 1878-79, Vol. 9, pages 377, 390.

"United States Surveyor General's Office.
San Francisco, Cal., August 22, 1878.

P. 377 Sir: In compliance with your instructions I have the honor to submit, in duplicate, the annual report of this office in relation to the surveying service in California during the fiscal year ending June 30, 1878.

I also forward tabular statements as follows:

* * * * * * *

On the 13th of September, 1877, Henry G. Rollins resigned the office of United States surveyor general for California, and was succeeded on

P. 390 the 17th of October of the same year by General John W. Ames. On the 6th of April, 1878, after several months of painful illness, General Ames departed this life, respected and beloved by all with whom he had come in contact during his brief administration.

The duties of the office were assumed by the present incumbent on the 25th of June, 1878.

Edward D. Knight, an employe of this office for many years, died March 6, 1878, after a prolonged illness.

Very respectfully, your obedient servant,

THEO. WAGNER,
United States Surveyor General
for California.

Hon J. A. WILLIAMSON,
Commissioner of the General Land Office."

COPIED FROM REPORT OF U. S. SURVEYOR GENERAL OF CALIFORNIA, DATED AUGUST 10, 1880, PRINTED AS PART OF EXECUTIVE DOCUMENT, 3rd SESSION, 46th CONGRESS, 1880-81, Vol. 9, pages 689, 755, 751.

"United States Surveyor General's Office,
San Francisco, Cal., August 10, 1880.

Sir:

P. 689 I have the honor to submit in duplicate the annual report of this office in relation to the surveying service in this district during the fiscal year ending June 30, 1880.

I also submit in duplicate tabular statements, as follows:

* * * * * * *

P. 751 H.—Statement of descriptive notes, decrees of court, &c.—Continued.

When sent.	Papers Transmitted.	Name of claim.	To Whom confirmed.
Aug. 7, 1879	Copy plat of survey; copy Freeman's field notes; copy instructions to Freeman to make survey; copy certificate of advertisement; copy decree of confirmation by United States board of land commissioners; copy of certificate of clerk of United States district court as to decree of confirmation by said court, with extracts from the minutes in the case; protest filed July 14, 1879, by B. T. Hanley, esq., of Washington City, as attorney for owners.	Mare Island	G. W. P. Bissell and William H. Aspinwall.

* * * * * * *

THEO. WAGNER,
United States Surveyor General
for California."

Mr. PECKHAM, continuing: We offer from Tubbs vs. Willhoit, 138 U. S., 143, a letter of the Secretary of the Interior, Mr. Schurz, appearing on Page 143 of 138 U. S. reports.

Mr. KELBY: The same objection.

The COURT: The same ruling and exception.

Mr. PECKHAM, continuing: We offer in evidence the letter of Edwin H. Sawyer, dated April 7, 1917, the inventory of his estate and the Decree of Distribution of his estate, certified by the Clerk of Alameda County.

Mr. KELBY: Objected to as immaterial, irrelevant and incompetent and an attempt on the part

of the plaintiff here to rely upon any weakness in the title of the defendants rather than on the strength of its own patent.

The COURT: Overruled and exception.

(The document was received in evidence as "Plaintiff's Exhibit BB".)

TESTIMONY OF F. A. STEIGER

A witness for Plaintiff.

I am the County Surveyor of Solano County and have in my custody the records of previous surveys, maps, etc., of that County. I have been subpoenaed to bring with me the original survey of Solano County, made by Surveyor Patton, but I find there is no map in our office that I have ever seen that purports to be the original survey of the County. I don't know the date of the oldest map showing the [253] boundaries of the County, but sometime in the 70's there is a map in the office that purports to be that, but not in the records of our office. I have searched for the Patton map but cannot find it. I have been subpoenaed to and herewith produce from the records in my office a book called a record of surveys of school land warrants. The school warrant found on Pages 36, 37, 38 and 39 of this record are signed by J. R. Loring, County Surveyor, by William Denton, Deputy for Solano County.

(The document was offered in evidence, subject to the same objection, overruled and exception, and was received in evidence as "Plaintiff's Exhibit CC".)

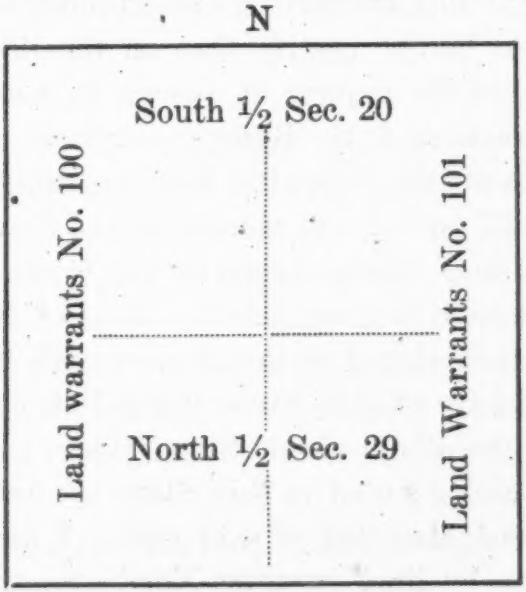
PLAINTIFF'S EXHIBIT CC.

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

Post from thence North 80 chains to the place of beginning all of which is in Township 5 North Range 1 West. The boundaries of which are more particularly set forth by the annexed Plat of said survey.

Township 5 North Range 1 West



Variation N 16° 00 E.

Nov. 17 1852

F. R. Loring, Co. Surveyor
by Wm. Denton, Deputy for
Solano County.

State of California,
County of Solano.

This instrument of writing was filed by me for record the 17th day of November, A. D. 1852 at 10 O'clock A. M.

Saishel Bynum
County Clerk.

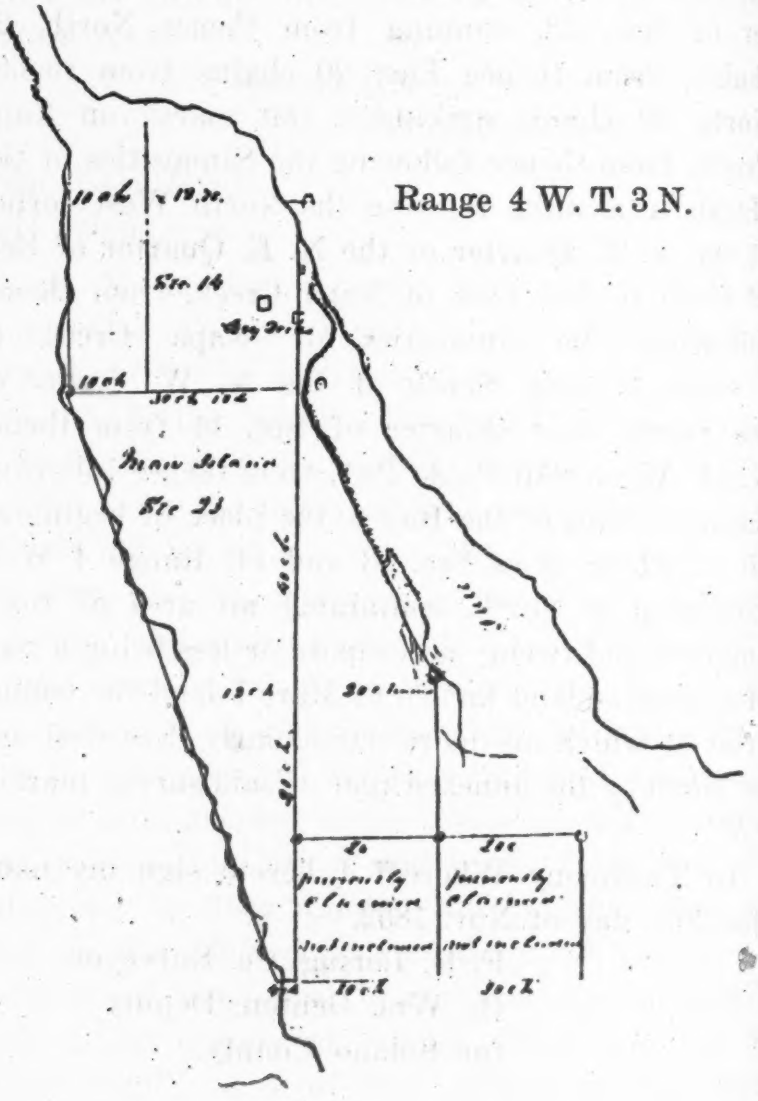
State of California,
Mare Island.—ss.

I, F. R. Lorring, County Surveyor of Solano County and duly authorized and empowered for the purpose do hereby certify that on the 19th day of Nov. 1852 at the request of Joseph P. Vaughn and J. B. Harkness & S. Bynum assignees of J. P. Vaughn locate the following land warrants Number 336 and 337 issued and signed by the Governor of said State and countersigned by the Comptroller of said State each bearing date the 22nd of Nov. 1852. In pursuance of and in accordance with the act of the Legislature of said State entitled an act to provide for the disposal of Five hundred thousand acres of land granted to this State by Act of Congress passed May 3rd of said year. I did run off and survey by lines running North, South, East & West on Mare Island situated South of Vallejo at the mouth of Napa creek in said State and supposed to be in the County of Solano, Three hundred & twenty "320" acres of land located by the said Joseph P. Vaughn and said assigns thereof. Which land so located surveyed and run off is bounded and described as follows, commencing at a stake on

San Pablo Bay on the Southern boundary of Sec. 23 in Range 4 West Township 3 North running from thence East 4 chains to the southwest corner of the South East Quarter of the South East Quarter of Sec. 23, running from thence North, 20 chains, from thence East 20 chains from thence North 20 chains striking a salt marsh on Napa Creek, from thence following the Sinuosities of the Marsh to a stake forming the North West corner of the N. E. Quarter of the N. E. Quarter of Sec. 23 from thence East to Napa Creek, from thence following the sinuosities of Napa Creek to a stake 1 chain South of the N. W. corner of the South East Quarter of Sec. 14 from thence N. 44° W. to San Pablo Bay, from thence following the sinuosities of the Bay to the place of beginning all of which is in Sec. 23 and 14, Range 4 West Township 3 North, containing an area of three hundred and twenty acres more or less being a part of a tract of land known as Mare Island the boundaries of which are more particularly described and set forth by the annexed plat of said survey marked "A"

In Testimony Whereof I hereto sign my name this 20th day of Nov. 1852.

F. R. Loring, Co. Surveyor
By Wm. Denton, Deputy
for Solano County.


Range 4 W. T. 3 N.

The within described land warrants are floated for the reason that the land upon which the same are located upon lands not the property of the United States, being a finally confirmed grant.

Charles Hastings, Assignee
and owner of said warrants.

State of California,
County of Solano.

This instrument of writing was rec'd by me for record the 22nd day of November 1852 at 40 minutes after 2 O'clock P. M.

Saishel Bynum, Co. Clerk.

WITNESS continuing: The school warrant found on Pages 114 and 115 of the same record is a survey on Mare Island and on the land opposite Vallejo, which is the neck of the island above the Navy Yard. This survey does not tie up to the other one on Page 39 by any evident survey line only just the general shape of the land; it ties up to the survey on Page 38 so that together they make a continuous survey of that portion of Mare Island.

(The document was offered in evidence, subject to the same objection and the further objection that no foundation had been laid, overruled and exception, and was received in evidence as "Plaintiff's Exhibit DD".)

PLAINTIFF'S EXHIBIT DD

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

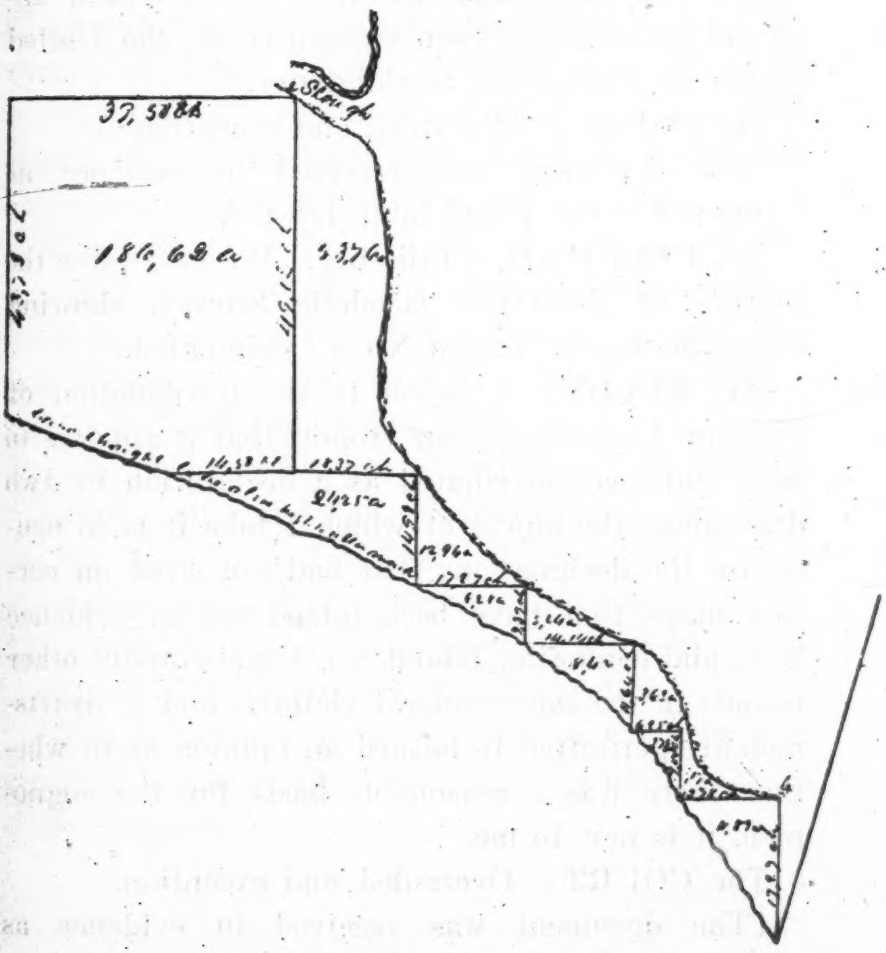
I, Hans Patton, County Surveyor of Solano County in the State of California being qualified do hereby certify that in pursuance of an act of the Legislature of California entitled "An Act for the disposal of five hundred thousand acres of land granted to the said State by an act of Congress," passed May the 3rd 1852 and at the request of Josiah Hanscom Esquire did proceed to survey and run off by lines running East, West, North and South three hundred and twenty acres of land Beginning at a point at the north end of Mare Island where the hill land stops and the tule sets in on the shore of San Pablo Bay and run N. to a point on Napa Bay marked on the *b*, thence northwardly along the shore of said Bay to a point on a slough marked *c* thence W. to point marked *d* thence south to the point on San Pablo Bay marked *e* thence with the shore thereof southeastwardly to the place of beginning and supposed to be in Solano County—and located thereon School land warrants number 151 and 274, for One hundred and Sixty acres each issued and signed by the Governor of the State of California and countersigned by the Comptroller thereof bearing date the 8th of June 1852 and 11th of Sept. 1852 respectively the first name issued to Frank Soule, and the other to Ed-

ward Byrne and assigned to the said Josiah Hanscom.

Reference is made to the annexed plat.

Given under my hand this sixteenth day of Nov. 1854.

H. Patton
County Surveyor
Solano Co.



A true copy of the original recorded November 17th 1854 at 10 O'clock A. M.

Jos. P. Vaughn, Co. Clerk.

Mr. PECKHAM: We offer a certified copy of the French Admiralty Map of 1844, of San Francisco, the original of which is in the Library of Congress.

Mr. KELBY: Objected to on the ground that it is immaterial, irrelevant and incompetent and on all of the other grounds heretofore stated, and on the additional ground that it is unauthorized, unofficial and has not been recognized by the United States as a map that is obligatory.

The COURT: Overruled and exception.

(The document was received in evidence as "Plaintiff's Ex- [254] hibit L-8-C".)

Mr. PECKHAM, continuing: We next offer the records of the Coast Geodetic Survey, showing where the name "Island No. 1" originated.

Mr. KELBY: I object to the introduction of this, on the ground, your Honor, that it appears to be a statement attributed as a declaration by two draftsmen, the object of which I take it is to neutralize the designations that had appeared on certain maps that have been introduced in evidence here, and connoting Island No. 1 and equally other islands in the same general vicinity, and if draftsmen are permitted to hazard an opinion as to whether there was a reasonable basis for the cognomen, it is new to me.

The COURT: Overruled and exception.

(The document was received in evidence as "Plaintiff's Exhibit L-31A".)

Mr. PECKHAM, continuing: We next offer from the records of the State Library, Gibb's map of 1852, also the Goddard map of 1856, from the State Library at Sacramento, also the official State Map of California by Whitney State Geologist in 1868, also the official map of the City and County of San Francisco, with an insert of San Francisco Bay, showing Mare Island, dated 1870, from the Coast and Geodetic Survey, also official map of the County of Solano, signed by the County Surveyor in 1872, also official State Geological Survey of California, J. D. Whitney, State Geologist, 1873, also Defendants' Exhibit "B" for identification.

Mr. KELBY: To all and every of which Exhibits "L-31A to L-38", inclusive, defendants object on the ground that each and every one of said proposed maps are immaterial, irrelevant and incompetent and not tending to serve any of the issues framed by the pleadings in this case and an attempt to change, alter and vary the description contained in the deed from Aspinwall, et al, to the United States and equally the patent of the State, and on the fur- [255] ther ground that they are cumulative.

The COURT: Overruled and exception.

(The documents were received in evidence and marked, respectively, "Plaintiff's Exhibits L-32 to L-38, inclusive".)

TESTIMONY OF CARL A. CARLSON

A witness for Plaintiff.

I am a Captain in the Civil Engineering Corps, United States Navy. I am now and have been for slightly over one year in the Bureau of Yards and Docks at Washington. I have had two tours of duty at Mare Island, the first in 1916 and the last in 1924. In 1916, I was in the Navy Yard about a year and a half and in 1924 a little over four years. I entered the Navy in 1903 and served at Navy Yards and Naval Bases on the Atlantic and Pacific Coasts and in the Hawaiian Islands, the Philippines, and about eight years also in the Bureau of Yards and Docks and on inspection duty outside of Navy Yards. Prior to entering the Navy, my training as a Civil Engineer has been as follows:

I graduated from the Case School of Applied Sciences in 1900, with the degree of Bachelor of Science and Civil Engineer, and I had three years' private experience before entering the Navy. I am familiar with conditions at the Mare Island Navy Yard. I know the territory embraced within Swamp and Overflowed Survey No. 34. The north end of 34 abuts upon the Navy Yard, what is now known as the Navy Yard fence and that fence is the southern boundary of Swamp and Overflow 569, involved in the Stuart case. I am familiar with the Freeman Survey. The Freeman Survey accords very well with the surveys of the Coast and Geodetic Survey.

Mr. KELBY: I object to that; they speak for

(Testimony of Carl A. Carlson.)

themselves. He is called here as an expert on maps.

The COURT: Overruled and exception.

WITNESS continuing: The Coast and Geodetic Survey is a survey of the exterior boundary of the high water line of Mare Island; [256] that is, the mean high water is what they seek to portray. The Freeman Survey is a segregation by so-called meander lines primarily for the purpose of determining the area and acreage of land involved in the property.

Q: I will show you defendants' exhibit for identification, No. 2, and call your attention to a delineation thereon of swamp and Overflow Survey No. 34, and also call your attention to a meander line and two arrows, "Shoreline 1852", and will ask you if you can state from your knowledge of the records of the Navy Yard whether that is a correct representation of the mean high water line of 1852?

A: No, that is a mistaken interpretation as to that line. We have earlier records, definitely defining that line in the compiled maps.

Mr. KELBY: I move that the answer of the witness be stricken out.

The COURT: Denied and exception.

WITNESS continuing: That line, properly interpreted, represents the junction of the high land with the low and marsh lands. It is clearly shown on the Sloat Board Map.

Referring to a line across the map, defendants' Exhibit for identification, No. 3, called "Line of

(Testimony of Carl A. Carlson.)

High Land", that does not represent the line of mean high water at Mare Island. It represents a contour partly due to filling in here. It is not an original contour line of any kind. It is the boundary of the filled land from the marsh land. This was simply a plan for the filling of that marsh land. This drawing is made primarily for another purpose, the only purpose indicated. It was simply a plan for filling in the marsh land, and that is all. The irregular shape represents the old steam engineering building, referred to quite often for a reference point, the first building erected in the way of shops. This approximates the south line of Swamp and Overflow Survey 34. This line is on Survey 34. [257]

Q: By Mr. KELBY: Captain, you have identified this map, I believe. State whether this map was not made by the Navy Yard at Mare Island?

A: It was made by the Public Works Official at Mare Island Navy yard for the purpose of indicating the area of the Navy Yard to be filled by dredging in anticipation of taking bids.

Q: What is the date of that map?

A: May 22, 1914. [258]

Q: Had any filling been done up to that time, so far as you know?

A: Yes, the line of high land is indicated here as an artificial line, indicating that previous to that there had been filling.

Q: Do you know what the character of the filling in was, either from your own knowledge or

(Testimony of Carl A. Carlson.)

from knowledge derived from records on file in your own office?

A: The filling outside of what you call high land or up land was largely excavation material from building sites, also material to be disposed of because the Navy Yard grade, to be of any value, must be away up above any ordinary line—sixteen feet above in the center, so that it takes quite a fill.

WITNESS continuing under questioning by Mr. Kelby: The natural elevation was increased by the fill about six inches.

WITNESS continuing under questioning by Mr. Peckham: Defendants' Exhibit for identification, No. 7, shows a detail of the areas along from the Steam Engineering Building on a larger scale and here the line is identified as the line of upland and tule. It looks like 1863, and the line marked 1863 Shore Line on the map (Defendants' Exhibit 4 for Identification) is the same line that is exhibited as "Line of Upland and Tule in 1863 in Defendants' Exhibit 7 for identification, is simply larger detail of Defendants' Exhibit 4 for Indentification.

Mr. KELBY: Q: What is the date of those exhibits respectively?

A: February 1906, Drawing T-188, and February 1906, Drawing, it looks like T-189. This is a very poor print. They are both made by an engineer named Rousseau.

Q: They were made here at Mare Island, were they? A: Yes.

Q: Do you know for what purpose they were made—from inspection of the maps?

(Testimony of Carl A. Carlson.)

A: The title of one is "Map of Mare Island between Steam Engineering Building and Swamp and Overflow Land 569." The other has marks showing the location of the shore line west of Steam Engineering Building.

Q: Do either of these maps show the location of the Machine Shop? [259]

A: Yes, both of them?

Q: Will you indicate that with the letter X?

A: On both of them?

Q: Yes. A: Yes.

WITNESS continuing: Referring further to Defendants' Exhibit "4" for Identification, the parallel and broken line called "Sand Shell Ridge" on that map represents the remains of the old, original sandy beach along the west side of Mare Island. That beach was largely depleted by the removal of sand for general purposes. The beach has been used ever since the yard started as a borrow pit for sand; that beach deposit was continuous throughout the length of Mare Island from the Machine Shop to the end of the Island. From the log of the yard, it is indicated that sand was first taken from that ridge about 1854 or 55, when they first started building.

Referring to the log of Mare Island now shown me, the record shows that on September 16, 1854, Commander D. G. Farragut took over the yard and at once commenced the work of constructing the Navy Yard; that practically from that time on sand was borrowed from this beach along the west side of Mare Island.

(Testimony of Carl A. Carlson.)

Mr. KELBY: Q: Have you examined the records that make up the file that I now hand you?

A: Yes.

Q: Will you point to the particular one that refers to the borrow pit?

A: We had to photostat the whole page to get a single entry. The entry of January 11, 1855 states: "Men employed as yesterday, except a sledge placed for hauling up sand from the beach." On January 12, 1855, "Commenced hauling up sand from the beach." January 13, 1855, "Hauling up sand from the beach."

Q: Is there any entry in any book or is there any entry in the file that you now have which shows the location of the beach?

A: The only place there was a sandy beach that they could possibly haul any sand up from was along here, starting along here, because there is no sand on this side, and naturally they would get the sand which is closest by.

Q: Are you able to show in the file that you now have, the location [260] of this borrow pit to which you have alluded?

A: I used the term "borrow pit" in a modern sense, any place you go to get material you call a "borrow pit". They do not use that term, they call it hauling up sand, which is the same thing.

Q: Didn't you state that the borrow pit extended up to the north-western part of the island?

A: We consider that whole sandy beach a borrow pit, as place to go and borrow material.

(Testimony of Carl A. Carlson.)

Q: When you said the northwestern part of the island, did you have reference to 34?

A: Yes, and beyond, right along.

Q: Right along? A: Yes.

Q: Even up beyond the southerly line of 569?

A: Yes.

Q: I will ask you this, do the remains of that beach still exist?

A: Yes. The beach can be followed on Swamp and Overflow 569 beyond the Navy Yard fence.

(The document was received in evidence as "Plaintiff's Exhibit EE".)

PLAINTIFF'S EXHIBIT EE.

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES NAVY YARD
Mare Island, California

10 August 1931.

I hereby certify that the annexed sheet is a photostatic copy of entries in the LOG BOOK OF U. S. NAVY YARD, MARE ISLAND, for September 16, 17, 18 and 19, 1854, on file at the Navy Yard, Mare Island, California.

[Seal] RALPH WHITMAN,
Public Works Officer.

1854

Log Book at U. S. Navy Yard, Mare Island

September 16th, 1854.

Commander D. G. Farragut took command of the Island this day, and forthwith warned off all the Squatters viz. Turner, Roy, Vera, Gilbert and Antonio Pinto.

Weather very fine; but warm.

Thermometer 86°

Sept. 17th, 1854.

Looked around the Island for the localities specified in the plan of the Navy Yard—employed in ascertaining the amount of property on the Island, that could be advantageously used by the Government.

Weather fine, but warm.

Thermometer 84° to 86°

Sept. 18th, 1854.

The U. S. Sloop of War "Warren"—Lieut. Comd. D. McDougal Comd. came up today to be moored at the Yard for the use of the Yard and a Store Ship and for the accommodation of the officers of the Yard.

Employed a carpenter to work on the Flag Staff (Vera). The weather very fine but warm. Thermometer 90° at noon.

Paid $500 for towing the Warren up.

Paid $192 for Pilotage.

Sept. 19th, 1854.

Fine day, made arrangements to dock the "Warren"—employed 2 or 3 more men to work on the Yard to fix foundation etc. for Flag Staff. Sent to San Francisco for lumber and other appliances to work with.

Thermometer 86°

UNITED STATES NAVY YARD
Mare Island, California

10 August 1931.

I hereby certify that the annexed three (3) sheets are photostatic copies of entries in the LOG BOOK OF U. S. NAVY YARD, MARE ISLAND, for December 30 and 31, 1854, and January 1, 2, 3, 6, 7, 8, 9, 10, 11, 12 and 13, 1855, on file at the Navy Yard Mare Island, California.

[Seal] RALPH WHITMAN,
Public Works Officer.

1854-5

Log Book at U. S. Navy Yard, Mare Island

Decr 30th, 1854.

Fine morning but cool. Ther. 40°. "Caledonia" finished discharging piles. We are out of square timber and obliged to suspend work on the Capping Wharf No. 3. Finished the foundation of the Southern wing of the Smithery and commenced on the Front foundation.

Decr 31st, 1854.

At 2 a. m. commenced raining and continued to rain the remainder of the 24 hours a steady rain. Ther. .....

January 1st, 1855.

At 1 a. m. commenced blowing from the So. and E. and at 3 a. m. wind shifted to South. The Brig "George Emery" broke from the moorings of the piles and swung off in the stream and let go their anchor, but the gale continued and she draged her anchor over to the North Eastern shore. At 4 the "Warren" began to drag the Port stream anchor off shore and forge ahead, but the 3d anchor held on and she only swung off shore about 100 feet.

In the Yard the covering of Hay Stack was mostly blown off. The frames were shaking and bent but not blown down. In Vallejo some of the houses were unroofed and some blown off the foundation blocks. Most of the workmen's boats were stoved, so that they could not cross to the Yard. The Bark "Caledonia" was blown once on the Mission road and still lies there. In the evening rec'd public letters from the Department, also plans of Timber Shed, Carpenter's Shop and new plan of the Yard.

Jany 2d, 1955.

Fine day. Ther. 48°. Had the "Warren" re-moored by planting a heavy anchor on the shore for Port Stern fast. Sent a Ridge Anchor to the Bark "Caledonia" to haul her off the bank, so that she could make sail. Only a few men employed today replacing hay roof, etc. Bark returned the Ridge. Commandant went to San Francisco on duty.

Jany 3d, 1855.

Rainy weather for the three last days. The men have all been employed as usual on the foundations

of the 3 buildings, Store House, Timber Shed, Carpenter's Shop and Smithery. On the 4th finished the small scow and launched her. On the 5th in the evening Comd't returned from San Francisco after having completed the contract for Store House and Timber Shed.

Jany 6th, 1855.

Fine day. Ther. 37°. Cold weather for this climate. Ordered the rough Carpenter's Shed to be built between the foundations of Nos. 40 and 46.

Jany 7th, 1855.

Rainy day. Ther. 40°. Sunday.

Jany 8th, 1855.

Wind fresh from the E. At 12:30 commenced raining and continued to do so the remainder of the day. The laborers made only ¾ of a day. Took on 20 men.

Jany 9th, 1855.

Cloudy, cold morning, but began to clear off a little by noon. Wind still fresh from the E. Men all employed as usual on the foundations and Avenue, pile driver at pile driving.

Afternoon the weather clear and fine.

Jany 10th, 1855.

Foggy morning but fine day. Wind still to the E. Men employed as usual on foundations. Nothing occurred worthy of note.

Jany 11th, 1855.

Cloudy, cold day. Ther. 40°. Men employed as yesterday. Except a sledge placed for hauling up

sand from the beach. Rec'd by the Napa City Steamer, 8 pairs of car wheels.

Jany 12th, 1855.

Ther. 45°. Fine day except that the wind is still from the E.—blowing fresh. Men employed as usual. Commenced hauling up sand from the beach.

Jany 13th, 1855.

Fine day. Ther. 44°. Wind blowing fresh from the E. and has blown fresh all night. Men employed as usual on foundations and avenue. Carpenters on wharf and shed for carpenters. Hauling up sand from the beach. Rec'd 50 bbls. of cement and 12 feet 4x4 scantling.

UNITED STATES NAVY YARD
Mare Island, California

10 August 1931.

I hereby certify that the annexed two (2) sheets are photostatic copies of entries in the LOG BOOK OF U. S. NAVY YARD, MARE ISLAND, for June 2, 3, 4, 5 and 6, 1855, on file at the Navy Yard, Mare Island, California.

[Seal] RALPH WHITMAN,
Public Works Officer.

Log Book U. S. Navy Yard Mare Island

June 2, 1855

Fine day, & a little cooler than yesterday, all hands at work. A fine breeze blowing from the Sou. W. Comdts visited the Massachusetts to see what re-

pairs were wanting, &c. Ordered the Derrick to be got ready. Rec'd the timber for the "Massachusetts".

June 3, 1855

Sunday. Fine day. Attended Divine service at the Church in Vallejo. Mariposa arrived with brick.

June 4th, 1855

Fine day but rather warm, smoky. Visited the Massachusetts to look at the distribution of weight in the Hold before taking her on the Dry Dock. Finally decided not to take her on, as it was not of sufficient consequence. The Engineer said he could get along very well without it.

Placed a Target on the Island for Massachusetts to fire at, across the Tuly on the Northern end of the Island.

June 5, 1855

Fine day, smoky appearance. Sloop load of sand arrived from the Yard. Hard pressed for wharf room to discharge vessels. Pile driver is at work driving piles as fast as possible, but the earth slides from the banks. Carpenters are framing the roof of the Smithery & making window sashes. Comd't went on board the Massachusetts to try the bulwarks by firing her guns at 10 A. M. Dr. Grumm visited the Yard at 12 M. Lunched on board the "Active" at 1-20. Comd't went on board the Massachusetts & commenced firing the starb'd guns at the target—distance about 1100 yards, found the bulwarks stood perfectly well, except the nails drew in the middle of some of the planks on the outside which are

only 1½ inch stuff. Firing well generally. Any shot would have struck the hull of a ship, but none struck the target. Fired 3 shells, all of which exploded five times. Cut the fuzes & explained the minutia of the fuze.

At 2 P. M. Dr. Ashe the Navy Agent came up & commenced paying off the men.

Mrs. Sears had the first born on Mare Island.

June 6th, 1855.

Fine day, very windy during the night, a fresh breeze all day. At 8 o'clock the Qt. Master schooner came off the Dry Dock & the Bark went on for repairs. At 4 P. M. the Bark came off the Dock, at 4 got up the Derrick.

UNITED STATES NAVY YARD
Mare Island, California

10 August 1931.

I hereby certify that the annexed two (2) sheets are photostatic copies of entries in the LOG BOOK OF U. S. NAVY YARD, MARE ISLAND, for November 14 and 15, 1873, on file at the Navy Yard, Mare Island, California.

[Seal] RALPH WHITMAN.
Public Works Officer.

Navy Yard, Mare Island
Friday, November 14th 1873
Part "First"

Weather clear and cool wind fresh from the West.

Part "Second"

" Clear and pleasant wind light from West
The Schooner "Emma Caroline" Capt.

A. Smith, arrived from San Francisco at 10 20 am with lumber for Y. & D. The Jamestown Steam Launch left for Sonoma Creek with 6 carpenters and material for putting up a Government House on Government land. A light rain shown during the watch.

Part "Third"

" clear and cool wind fresh from the North The Jamestown Launch returned from the Tuiles at 10.30 P.M. Pumping out the Cofferdam to day.

Thermometer		Barometer	
Sunrise	54	Sunrise	30-02
Meridian	64	Meridian	30-00
Sunset	68	Sunset	30-00

"Tides"

Low tide at 3.30 am
High " " 10 "
Low " " 4 P.M.
High " " 10.30 "

	Workmen	
Construction	Employed	445
Yards & Docks	"	369
Steam Engineering	"	112
Provision & Clothing	"	5
Equipment	"	51½
Ordnance	"	19
Navigation	"	1
		1003

the rain fall for the last 24 hours was 00015 of an inch.

Navy Yard, Mare Island
Saturday, November 15th, 1873

Part "First"

Weather clear and pleasant wind light North

Part "Second"

" clear and pleasant wind light from East. The Schooner "George Woods" Capt. W. Elliott arrived from San Francisco at 8 am with 400 Barrels of Lime for Y. & D. The Jamestown Steam Launch left the yard at 9 am with lumber & carpenters to finish House on Tulies. Also carpenters and material was sent up on the tulies about a mile above the Foundry on the San Pablo Bay side to build a Government House on land claimed by the Government. The Ship "Coquimbo" Capt. C. Eyer arrived from San Francisco at 10.30 am with Piles & Timber for Y. & D.

Part "Third"

" Clear and cool wind light from East. The Jamestown Steam Launch arrived from the upper Tulies at 4 P.M. all work being finished. The Schr. "George Woods" sailed at 4.30 P.M. The Steam Pilot landed freight for the yard, pumping out cofferdam to day.

Thermometer		Barometer	
Sunrise	56	Sunrise	30-14
Meridian	68	Meridian	30-22
Sunset	66	Sunset	30-24

"Tides"

Low	4 am
High	10.30 "
Low	4.30 P.M.
High	11 "

Construction Workmen Employed		487
Yards & Docks	"	3.13
Steam Engineering	"	111
Provision & clothing	"	5
Equipment	"	50½
Ordnance	"	19
Navigation	"	1
		936½

James Tilton, Charles Schafe, Michael McNamara, Watchmen are occupying the new building on the tulies above the Foundry. John Charlton, Watchman is occupying the new building on Sonoma Creek.

WITNESS continuing: The configuration of the surface here has been changed in certain respects since 1853. The configuration of swamp and overflow survey 34 has been changed by being leveled off and cultivated but the remainder of this beach on 569 is more perceptible than it is now on 34.

Mr. PECKHAM: We now offer a letter from the files of the Navy Yard from Commandant John Rodgers to Commodore C. R. P. Rodgers, U. S. N., Chief of Bureau of Yards and Docks, Washington, D. C., dated September 26, 1873.

Mr. KELBY: We object to it as immaterial, irrelevant and incompetent and not tending to support any issues in this case.

The COURT: Overruled and exception.

(The document was received in evidence as "Plaintiff's Exhibit FF".)

PLAINTIFF'S EXHIBIT FF.

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES NAVY YARD
Mare Island, California

10 August 1931.

I hereby certify that the annexed eight (8) sheets are photostatic reproductions of a copy of a letter from the Commandant, Navy Yard, Mare Island, Cal., to the Chief of the Bureau of Yards and Docks, Navy Department, Washington, D. C., dated 26 September 1873, including endorsement on filing jacket, on file at the Navy Yard, Mare Island, California.

[Seal] RALPH WHITMAN,
Public Works Officer.

No. 230.

Commandant's Office
Navy Yard, Mare Island, Cal.
26 Sept. 1873.

Sir:

I have the honor to enclose herewith copies of papers, which are on file in the Land Offices here, in regard to the extent of land comprising Mare Island.

As the United States bought for naval purposes, Mare Island, "including all the tule or low land and marsh belonging to the same, or which has ever been reputed or claimed to belong to the same, and all the waters, harbors, bays, creeks and other water privileges etc., thereunto belonging," the intention of possessing and retaining all the tule land is as clearly expressed as its intention to possess any other part; what it paid for, it must be supposed to have wished to own.

The question remains what is Mare Island?

The Land Commissioners of the U. S. in their confirmation of title to Bissell say Mare Island "being an island is bounded by the waters edge."

The title deeds for Mare Island convey to the Navy Department all the tule or lowland and marsh belonging to the same, or which has ever been reputed or claimed to belong to the same.

The Board sent by the Navy Department state, in their official letter, that "the island, including the tule opposite Vallejo, contains about nine hun-

dred acres, in addition to a large tract of tule extending towards Napa and Sonoma."

Thus it appears that the Government intended to purchase, and did purchase, an immense tract of tule land extending towards Napa and Sonoma: the boundary is tersely expressed by saying: "Mare Island being an island is bounded by the water's edge." In the official map of the State of California, ordered by Act of Legislature in 1853, and published in 1854, it is thus bounded, being laid down as about ten (10) miles long. In the map published by Warren Holt, of San Francisco, in 1860 its dimensions are the same.

It has been alleged that Castro, the Mexican, from whom the vendors to the United States derived their title had, himself, no valid title, but, even if true, this cannot affect the rights of the Government; for if Castro had no title, then the United States, in its own right of conquest and purchase, had acquired the ownership from Mexico.

Besides the U. S. Land Commissioners Messrs. Thompson and Farwell decided that Bissel's title derived from Castro was valid.

The tule lands in question have a great prospective value to the government for artillery practice. Until recently, the Navy had no site upon the Atlantic Coast where the needed trials of Ordnance could be made.

Here, under the deed from Aspinwall and others, a perfect range was bought, long enough, about seven miles, to test any imaginable improvement in

artillery. A firm sand beach borders the whole of this tule land on the west side.

The ownership of this land is desirable to the Navy that it may have necessary control of the water front, that it may prevent the erection of structures projecting into the stream that would deflect the currents, and damage the harbor, and that it may hinder the establishment of objectionable manufactories, or habitations for junkmen or liquor dealers.

It is stated that the tule land in question was bought from the State of California, by private parties, in the year 1857.

As it is very desirable that the question of title should be settled and the boundaries of the Government property clearly defined, I would suggest that the matter be referred to the U. S. District Attorney at San Francisco, who, from his familiarity with the land titles and laws of California, will be able to present to the Government a clear synopsis of the merits of the case.

The Act of Sept. 28, 1850, called the "Arkansas Swamp Land Act", is relied upon to establish that the title laid in the State of California and not in the United States; and Castro it is said, could never, under Mexican law, own the title to tule land. However this may be, the U. S. Commissioners decided that Mare Island is bounded by the water's edge, and the Board sent out to examine and report upon the proposed purchase declared

that the island included an immense tract of tule land extending towards Napa and Sonoma.

In regard to the Arkansas swamp land act, under which California sold the tule lands of Mare Island, it was a necessary condition to the operation of the Act that such land should be unsold. Therefore, if Castro, as decided by the U. S. Commissioners, owned the land, the State of California could not acquire it under said Act. But when the State of California, April 28, 1855, passed an Act to provide for the sale of land belonging to the state, Mare Island, including the tule land in question, had, two years previously, already been sold to the United States.

I also enclose a copy of the patent whereby the State of California conveys to Dana N. Darlington 164 55/100 acres of the tule land herein referred to, dated March 18, 1857. This land adjoins the Foundry on this Yard. We have been admonished not to take sand at a distance of some fifty feet from that building.

The accompanying charts, forwarded by mail, with the enclosed papers, will fully explain what I claim as Mare Island.

I am

Very respectfully,

Your Ob't Serv't

JOHN RODGERS,

Commandant.

Commodore
C. R. P. Rodgers, U. S. N.,
Chief of Bureau of Yards and Dock,
Washington, D. C.

Commandant's Office
Navy Yard, Mare Island
Rodgers, John
Commandant

In relation to titles and boundaries of Mare Island, enclosing copies of papers relating thereto, and forwarding charts by mail.

III.

WITNESS continuing: I recognize the photograph now shown me as an aeroplane photograph of Mare Island. It truly represents the [261] lay of Mare Island at present. The long patch of white running along the western rim of Mare Island represents the area between the original sand ridge and the dykes that were later constructed for reclamation purposes and you can see the trace of the road right through there. The color is apparently due to the height of the grass. It shows very clearly. The line of the old borrow pit deposit of Mare Island is in back of the levee and the levee was built years later, after the beach had built up from mining debris and silt from the river. The deep white strip ends at the Navy Yard fence and everything south of that is in Swamp and Overflow No. 34. This copy shows the improvements now on the

(Testimony of Carl A. Carlson.)

land in controversy on a small scale. I am familiar with the improvements on the land in controversy. I now mark on the map with an arrow the location of the Machine Shop. This is an aeroplane photograph and does not show the line of the high land as it existed in 1852. I am very familiar with the location of the high land or the upland as it existed in 1852 as derived from maps, that is, I am familiar with them from the early records. Survey 34 would start about here. The large black spot is the steam engineering building, and Survey 34 would run from there along the sand ridge up to the present Navy Yard fence. The white surface indicates one of the basins used for the deposit of hydraulic dredging due to the maintenance work in Mare Island channel. It is built to retain the fill and in that way gradually bring it up to what we call a work shop grade. It does not represent a natural condition, but it is an artificial fill. Such fills are not completed at any one time. It is a progressive operation. They put in a little, perhaps a few inches of sediment—6 inches—and then six months later put in more, because it is a convenient dump for the deposit of the dredger spoil. This photograph was made on January 12, 1932.

I have prepared from the records a list and location plan of the improvements on the land in controversy. It was prepared dur- [262] ing September, 1921, under my direction by several individuals, but checked by me. It is substantially correct to the best of my knowledge. I believe the principal improvements on this land are set forth

(Testimony of Carl A. Carlson.)

in the scale headed: "List of Improvements". I am acquainted with the cost of each improvement. There is a table giving the approximate cost of each improvement on the plan.

(The document was received in evidence as "Plaintiff's Exhibit GG".)

The table shows the list of improvements, what the improvements consisted of, the number of it designated by a circle on the map, the date built, the approximate cost, whether or not it is still standing, and under "Remarks" whatever was necessary to make it clear. The existing Navy Yard fence between 34 and 569 was built in 1914. The first improvement built on 34 was an artillery target built by Commodore Farragut in 1855. The road along the beach was the next improvement, built in 1855. The date appears with respect to the building of each improvement upon this location plan.

WITNESS continuing: The acre content of Mare Island south of the upland is something around 750 or 800 acres.

Mr. PECKHAM: We offer this photograph in evidence.

Mr. KELBY: Objected to as incompetent, has no relation to the time of the Land Grant Act of September 28, 1850.

The COURT: Overruled and exception.

(The document was received in evidence as "Plaintiff's Exhibit HH".)

WITNESS continuing: I am familiar with Defendants' Exhibit 6 for identification. The broken

(Testimony of Carl A. Carlson.)

line on this exhibit running from the Steam Engineering Building to a place called the Tanks [263] called the original high water line, represents the line of extreme high water and the line of the upland. A similar line on the east side of Mare Island, running from 15th Street in a meandering line to 20th Street and down again to the dot near the Ammunition Depot, also labeled "High Water Line" is the approximate location of the extreme or extraordinary high water line and the line of upland. It is not strictly correct because of the improvements, but for the purpose of this line I had it put on the map so as to have a rough guide as to where the higher firm ground originally was in putting out new structures and I had them put on improvements. The purpose was to indicate the general foundation of buildings that were put on and to mark the line of extraordinary high water, which would be also the line of upland. It is substantially correct and was prepared by the Navy Yard, and is an actual map of the Navy Yard at Mare Island, showing conditions on June 30, 1925, a record of improvements from year to year.

Referring to Defendants' Exhibit "8" for identification, this document is a photostat of a tracing of a portion of Mare Island, prepared October, 1900, to accompany papers relating to the claim of E. H. Sawyer to 164.55 acres of Swamp and Overflowed Land. The tracing paper now shown me apparently is the same as Defendants' Exhibit "8"

(Testimony of Carl A. Carlson.)

for identification because I notice the tracing has the same omission.

(The tracing was marked "Government's Exhibit II for identification".)

WITNESS continuing: The green area on this exhibit just slightly north of the red area, which purports to have been surveyed by H. Patton, Surveyor, in June, 1855, of land issued to David N. Darlington by the State of California, March 18, 1857, and platted from Patton's notes.

Q: I call your attention to a legend on the map: "Red lines show the same area as the green lines, but it is plotted to agree [264] with the survey of the land immediately adjoining on the north made by William W. Fitch, County Surveyor of Sonoma County, September 28, 1869, and with the topography as described in Patton's notes." Which is the red survey? A: This area here. Q: Which one best accords with the physical features of Mare Island? A: The red one.

WITNESS continuing: The line on the tracing of the original mean high water of Mare Island follows the water representation on the water side of the red survey. The Fitch survey is a fair representation of the line. The easterly line is also a fair representation of the mean high water line on the east of Mare Island. This red is the same survey as the green, but taking Patton's survey as the basis for starting, you get Fitch's location. This is still the Patton survey plotted by Fitch. It is still a Patton survey.

(Testimony of Carl A. Carlson.)

WITNESS continuing: My understanding of upland is any land that is about four or five feet above the ordinary mean high water—roughly, it runs from four or five to eight feet up to 20 or 30 feet along back on the Island. The word "Upland" in line of upland would convey to me the information, land above mean high tide. The line dividing the land above mean high tide and the land below mean high tide is all above mean high tide. It is the dividing line between lowland and upland—it is all above mean high tide. I mean that the land on both sides of that line would be above mean high tide. The levees and canals shown on the map is what we call the Cross Levee built in 1897, when Dr. Cross came down here and assumed he was closing in a part of 569; he got off half a mile; he made his own survey and got off half a mile down on to 34 and he thought he was running the south line of 569. He dug this canal which connected the waters of San Pablo Bay with those of Napa River and put the levees in to reclaim that piece of land.

Referring to Defendants' Exhibit 4 for identification, the canal and levee are represented on that map. The water-way indicated by the word "slough" is artificial; that is probably where the bridge might have gone in and come up this way. [265]

Mr. KELBY: Q: The term "Line of upland" has no relation to tides, has it? A: All the lines have relation to tide. Q: I mean in a specific sense? A: Yes, because all of the elevations on the topographic maps are given so many feet above the

(Testimony of Carl A. Carlson.)

plane of mean high water or any other reference place you may use. Q: But when the words "Line of Upland" are delineated on a map, professional map, have they reference to high tide or low tide or mean tide? A: Their relation does not change with respect to any of those tides. Those tides are merely stages of measurement. The land is still there.

(Defendants' Exhibit 8 for identification and Government's Exhibit II for identification were received in evidence as "Plaintiff's Exhibit II".)

WITNESS continuing: My understanding of shore line is any specific line of measurement for determining the intersection of the water line with the land. We ordinarily start with the shore line of low water and come up to the shore line at any other stage of the tide. I would not use the words "Shore Line" to indicate the line of highest high water. I would use the words "Shore Line" to indicate the line of mean high water, but I would mark it "Shore Line, at mean high water." Without the indication of what the shore line is, the words "Shore Line" do not mean anything—it must be identified. I have a tracing of a map of 1861 of the Navy Yard which I now produce. It is from the records of the Bureau of Yards and Docks. It is in the records of the annual estimate, I believe, which you had sent in from the Navy Yard. The dark line on this map, surrounded by blue, indicates the shore line and also is apparently used for the bluff as well. This map is not marked to show any indication of where the mean high water line

(Testimony of Carl A. Carlson.)

be it because of the Coast Survey, and the Navy Yard used mean high water. The blue indicates the division in between the land and the water at that [266] stage of the tide that is stated, or mean high water. The staggered line or meander line along the east side of Mare Island, called "Edge of Upland" corresponds to the edge of upland shown on the early topographical map of Mare Island, which is the Cutts map, and it distinctly shows there that it is a line of division between land because the water is colored separately.

Mr. KELBY: Do you know when this map was made?

WITNESS continuing: It was made September 14, 1861, forwarded by letter from Captain Gardner, dated September 14, 1861, to the Bureau of Yards and Docks. The maps of Mare Island were made fundamentally from original surveys, also basic maps originally and later Coast Survey Maps. It is better than a compilation of maps because it is definitive of the land. It does not simply depict something that is found in something else, but shows the condition at that date. This was an instrument survey, but it does not have to be done every year.

Q: Where, approximately, is the location of the land in controversy? A: Starting with this line of upland and running up here. Q: Is the line of upland legend on that map? A: It is marked "Edge of the Upland", in dots; anyone would interpret it to be the same line because of its relation to the

(Testimony of Carl A. Carlson.)

blue shaded line. The title of this is "Sketch of Mare Island Showing Location of Navy Yard and Magazine." Q: That is in 1861? A: 1861.

(The document is received in evidence as Plaintiff's Exhibit JJ".)

WITNESS continuing: I have a tracing of the map of 1872-73 of the Navy Yard, of which I produce a photostatic copy. The "Line of Upland and Highest High Water" indicates a line of extraordinary high water. We have such water sometimes, but once in ten years; sometimes they may come a few years apart but any extreme flood or unusual stage of the tide would be extreme high water; that would also correspond to the nearest line of upland because the water would [267] get up on the upland with such extraordinary tide. The similar line on the east shore of Mare Island, called "Line of Upland" and "Line of Highest High Water" is identified with that. Both of these lines very closely, as maps go, would represent the original line shown on the Cutts topographical survey. The word "tule" in between that line and another line marked "Line of Tule" indicates marsh land above the line of mean high water, showing this is the bank here, probably six inches to a foot and this flatter marsh running in. sloping up to the upland. The map-maker indicating by "Line of Upland" means the line of highest high water and he has so marked it. The tule land to which I have referred is located right off Mare Island, originally on the easterly side in front of the hospital. The word "tule" up here north of the line marked

(Testimony of Carl A. Carlson.)

"Line of Upland and Highest High Water" indicates the general low marsh land bordered with tule.

(The document was received in evidence and marked "Plaintiff's Exhibit KK".)

WITNESS continuing: The Coast and Geodetic Survey have established three bench marks at Mare Island. I recall praticularly the one on the dry dock coping. A bench mark is any well fixed point from which the elevations can be measured or run to other points on the land or water. Tidal observations are referred to a bench mark. In order to determine the datum plane of mean low water the mean of the lower low water, we generally use the mean of the lower low, the same as the Coast Survey has zero. They have a tide gauge at Mare Island. The present gauge has been installed since about 1918. Before that it was installed at the Independent Wharf, but they have continuous tidal observations for about twenty-five years. The best records of any place in the vicinity. I have prepared some charts of tidal variations during the typical months of that period. I have three plates plotted for convenience in readings taken from the original tidal records [268] of Mare Island. One is marked Plate 5, Tidal Regimen, Mare Island Straits for the representative month of November, 1929. Plate 6 is for the rainy season month of February, 1905. Plate 7 is for the dry season month of June, 1905. The spring tides are the two tides that occur immediately after the new and after the

(Testimony of Carl A. Carlson.)

full moon in every lunar month. They have a peculiarity at Mare Island and on the west coast in that the two high tides of that day and subsequent days do not reach equal elevations. One tide goes high and the other is low, about one-third or one and one-half feet in height. It runs one-third to one and one-half feet lower. The high tide in the morning and the high tide in the evening will reach different elevations. The astronomical neap tides are the two tides that occur immediately following the first and last quarter of the moon, that is, the time interval between the change is the full of the moon or between the new moon and full moon, that is, seven days after the new moon and seven days before the full moon; seven days after a full moon and seven days ahead of the new moon, that is the lunar cycle. The neap tides are lower than the spring tides. Mean high tide is the plane to which the average of all of the high tides, both neap and spring, for every day in the year would reach, the average of all of the high tides throughout at least one month and probably for several years' observation, to determine the plane of mean high water to any degree of refinement. The ordinary high water mark is synonymous with mean high water mark or medium high water mark. Originally this was not so but due to legal interpretation, the wording of ordinary neap tides was carried over to mean the same as medium or mean tides. We call the datum plane of mean lower low waters at Mare Island 100 even. The Coast Survey would call it zero.

(Testimony of Carl A. Carlson.)

The coast survey monument at the dry dock gives the height of the mean high water above that datum plane as five and one-half feet. We are now using 5.8. We have used 5.6—it depends on the length of the series of observations and the particular location of the tide [269] gauge. For instance, up Napa River the plane of mean high water would be still higher. The further you go up the Napa River, the higher becomes the plane of the mean high water. At least one month of observation of the tide is the minimum necessary to establish mean high water, that is, fifty-seven tides or so. I am referring to one lunar month and the tide should be observed at two-hour intervals, that is only an approximate determination.

I now produce plates showing tidal elevations. The plate representing the month of November, 1929, and the month lined up into thirty days is correct. For each of the days there is a line indicating height of the tide and as the tide stops on each day there are lines platted to show the highest point of the tide on those days. On the first we have a low tide reaching about five and one-half feet and the higher tide reaching six and one-half feet. On the second, the higher tide reaching 6.8 and the lower tide falling to 5.3. Each day the dotted line is one tide and the solid line is the other. On the 7th of the month are indicated the transition tide, where both tides occur; that is they come to the same height. About two days in the month, the 7th and the 23d, at Mare Island, on the West

(Testimony of Carl A. Carlson.)

Coast, you get two high tides that are about equal and for the rest of the time they vary from a foot to a foot and a half. There are many factors besides the attraction of the sun and moon that affect the behavior of the tides at Mare Island, such as the configuration of the coast line, the direction of prevailing wind, the condition of floods in the San Joaquin River and Sacramento River and Napa River, all those combined to influence the behavior of the tide at Mare Island.

On Plate 6, which I have selected because it is the same year as the Rousseau Map was made, we can go back in these records which are readily available so that we can plot them with great accuracy. The mean high tide for the month of February would be above the ordinary plane of high water, whereas the month of June shows a marked [270] contrast.

The construction of artificial works on Mare Island, started by both Government and private parties, is an element that enters into the plane of the tide. The checking and enlarging of the tidal prism influences the level to which the tide will rise. The erection of artificial works generally tends to choke it. The year 1897 is the date that I am familiar with as being the date when works of reclamation were constructed on land claimed by the Government at Mare Island. From official records relating to words on 34, the reclamation work consisted of throwing up a levee so as to exclude all of the tides, flood and extraordinary tides and high spring, in

(Testimony of Carl A. Carlson.)

other words, to exclude the water entirely. The reclamation of these lands, consisting in the erection of these levees kept off all tidal waters of the low lands of Mare Island. The effect of such a process on the levels of Mare Island is that the land is deprived of its regular, natural flow and ebb process and dikes off, depending upon the character of the soil. It dries and shrinks and settles. It varies a great deal with the character of the soil and it continues over a long period of years. The walling off of the water from the land prevents any increment to the land from silt in times of flood. It also causes a settling of the soil by the evaporation and abstraction of the water. I had a topographical survey made of the land at Mare Island at the neck of the island between the Machine Shop and the northerly limits of 34, that is, took a series of levels with a level and rod over the area of 34 when I was stationed there in 1917. Last year I had a series of levels taken at cross sections along this same land. The result of the running of those levels indicated a gradual but marked lowering of the lines of elevation of the land. That the line was lower in 1931 than it was in 1917, and the line of 1917 was lower than the line of 1906. We had the Rousseau Survey showing the elevation in 1906, showing definitely the lines of elevation over that period of years. [271]

Mr. KELBY: I submit, if your Honor please, that while this is very interesting, as well as instructive, that it is incompetent, not tending to sup-

(Testimony of Carl A. Carlson.)

port any issues in this case, and I object to this testimony on those grounds.

The COURT: I suppose it has something to do with showing swamp and overflowed lands. Overruled and exception.

WITNESS continuing: I was a member of a party, including Mr. Peckham, who picked up the line of the Dyer Survey of 1863 in July of last year. That survey ran the line of Reservation No. 7 approximately as indicated in the Smith Board report and that also ran the line of President Fillmore's Reservation No. 7. This called for me to pick up the east line of Reservation No. 7, running from Benecia parallel with Mare Island Straits to a point 800 yards north of the northern post high hills north of Vallejo and opposite the north end of Mare Island.

Mr. KELBY: I object to that as incompetent and move to strike it out.

The COURT: Overruled, denied and exception.

WITNESS continuing: That point fixed by Dyer is the point 800 yards north of the northernmost high hills north of Vallejo and opposite the survey of the north end of Mare Island and thence to the Straits. We picked it up very well, possibly within fifty feet. When we looked through the telescope on the level or transit, we picked up the Bascule Bridge at Sonoma Creek, and that bridge is on the toll road between Mare Island and Tubbs Island across Sonoma Creek.

Q: Was that point opposite the north end of Mare Island, according to the Smith Report and

(Testimony of Carl A. Carlson.)

President Fillmore's Reservation, north or south of Swamp and Overflow Survey No. 34?

Mr. KELBY: I object to that as calling for the conclusion of the witness and not the best evidence.

The COURT: Overruled and exception. [272]

WITNESS continuing: It is shown on the map there as plotted fairly accurately. It is shown in this description to be three-fourths of a mile north of 34. In fact, the hills here are such that you cannot see anything of 34 from here. This is a high ridge of hills. Your view would be up this way to get a view on the upper end of the island.

Mr. PECKHAM: I offer in evidence a letter from the records of the Navy Yard of John Rodgers, Rear Admiral and Commandant, to the Board of Surveyors of Solano County, November 25, 1873.

Mr. KELBY: I object to the introduction of that letter on the ground that it is immaterial, irrelevant and incompetent and on the further ground that it is self-serving and it is simply a declaration on the part of the United States which would not warrant it in law and is not binding on the defendant in this case and is overthrown by a patent which has been issued in this case to the State of California, inuring to the benefit of the defendant.

The COURT: Overruled and exception.

(The document was received in evidence as Plaintiff's Exhibit LL".)

PLAINTIFF'S EXHIBIT LL

[Endorsed]: Filed May 3, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

(Testimony of Carl A. Carlson.)

UNITED STATES NAVY YARD
Mare Island, California

I hereby certify that the next photostat copy of letter from the Commandant, Navy Yard, Mare Island, California, to the Board of Supervisors of Solano County, under date of November 25, 1873, is a true and literal exemplification of the record on file in the Public Works Office at Mare Island, California.

RALPH WHITMAN
Public Works Officer.

August 11, 1931

(Copy)

Navy Yard, Mare Island, Cal.
November 25th, 1873.

To the HON. BOARD OF SUPERVISORS
of Solano Co. State of California.

Gentlemen:

Certain persons having petitioned to your Honorable Board desiring to adopt measures to reclaim tule land appertaining to Mare Island.

And as your Honorable Board has appointed the 3rd day of December next for the hearing of said petition.

I feel it my duty, hereby to notify you that this land is claimed and occupied by the U. S. under orders from the Navy Department of the United States at Washington, D. C. the same having been purchased January 4th, 1853, after the Commissioners of the U. S. under the Act of Congress appd. March 3d, 1851, had confirmed the title under which

(Testimony of Carl A. Carlson.)

the United States now holds the land.

I further feel it my duty to protest against any action antagonistic to the ownership and possession by the Navy Department of the U. S. of Mare Island and the tule thereto belonging as well as in the words of the deed, "its waters, creeks, harbors, bays, and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging."

I am, very respectfully,

(Sgd) John Rodgers,

Rear Adml. & Commandant.

WITNESS continuing: Referring to the Plates 5, 6 and 7, showing the tidal regimen for the month of October, 1929, the month of February, 1905, and the month of June, 1905, the month of November was selected as typical or representative of the average. The months of February and June were selected to illustrate the variations in one year between just a few months. The year 1905 was one of a 40% excess rain fall over normal. It shows up very well in the curve and particularly in February where the tides reached a higher elevation than they did later in June. The others in the summer or dry season, which are the average of all the tides, will be lower. That is characteristic of any tidal regimen where it is made up of tide, river and wind combination, which have a decided influence on the flow of the tide at Mare Island because of the pe- [273] culiar strong westerly trade wind that blows during the summer months—that is a big factor.

(Testimony of Carl A. Carlson.)

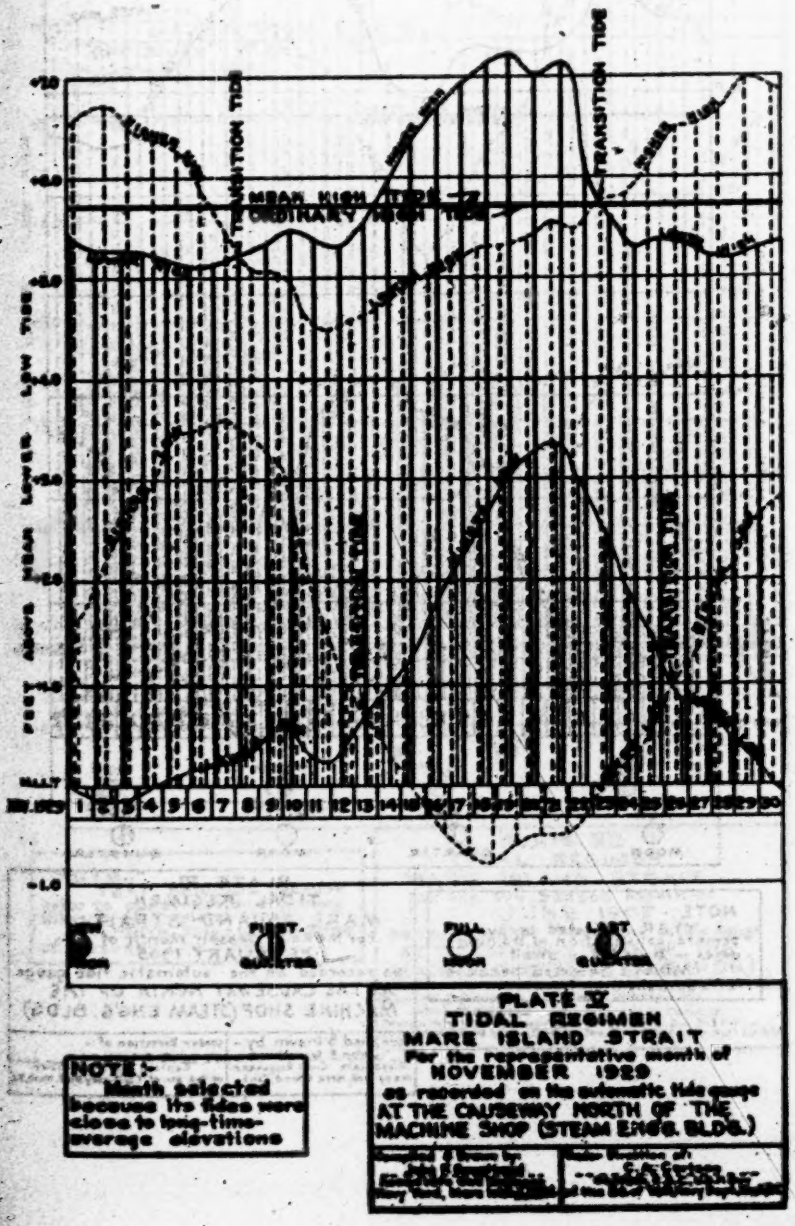
The mean high tide at Mare Island is a mathematically-determined line, which is averaged from all observations over a number of years and at Mare Island we have twenty-five years' observation. The longer the period, the better the plane of mean high water, but for ordinary purposes one month would be a minimum for a rough approximation. From my study of the tides and tidal records, it is not possible to say what is the mean high tide at Mare Island by visual observation of the flowage.

(The tidal plates were received in evidence as "Plaintiff's Exhibit MM".)

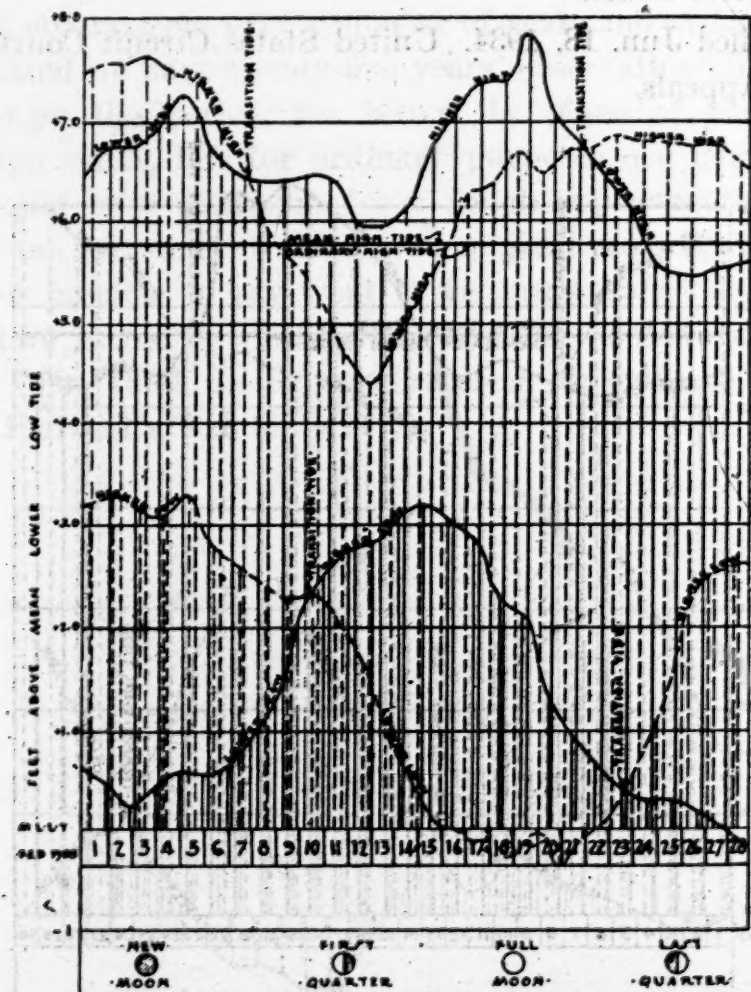
PLAINTIFF'S EXHIBIT MM

[Endorsed]: Filed May 4, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.



Page 2 of Plaintiff's Exhibit MM

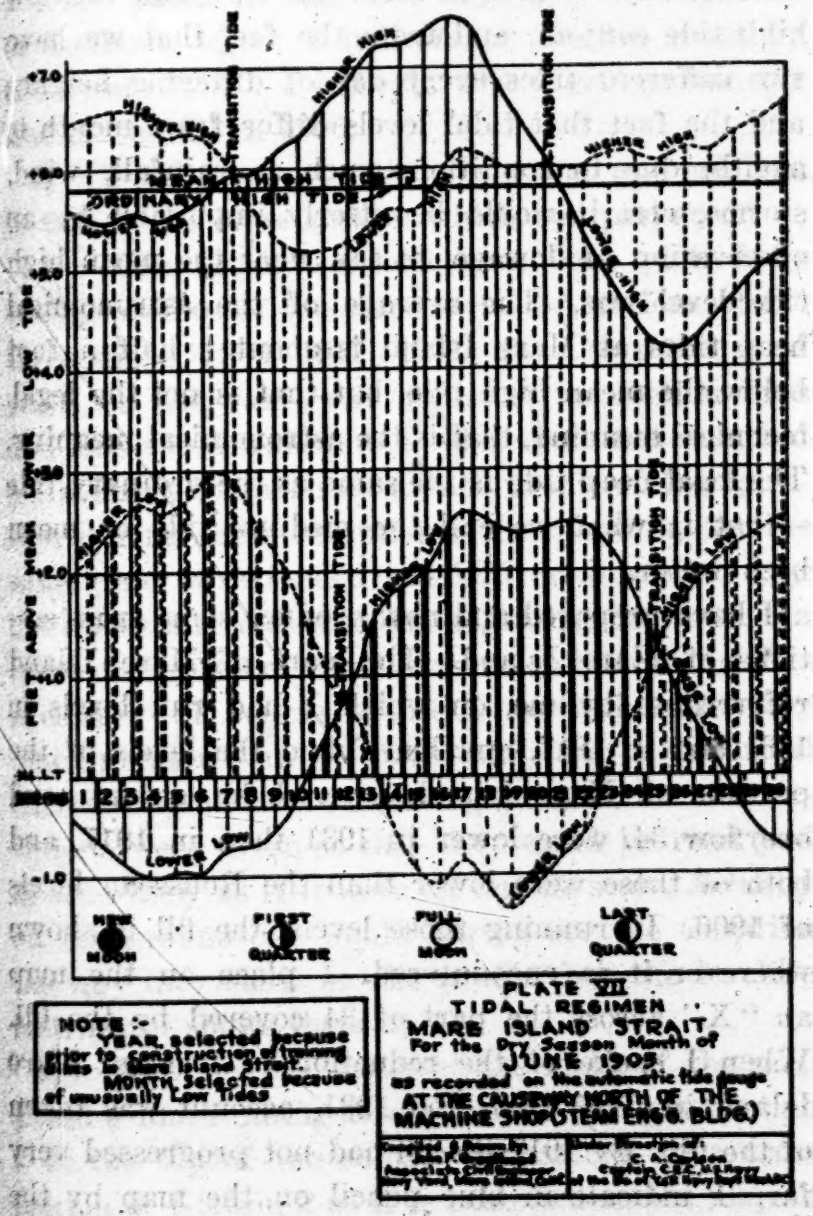


NOTE:-
YEAR selected because prior to construction of training dikes in Mare Island Strait
MONTH Selected because of unusually High Tides.

PLATE VI
TIDAL REGIMEN
MARE ISLAND STRAIT
For the Rainy Season Month of
FEBRUARY 1905
as recorded on the automatic tide gauge
AT THE CAUSEWAY NORTH OF THE
MACHINE SHOP (STEAM ENG'G. BLDG)

Compiled & Drawn by:-	Under Direction of:-
John F. Greenhead	[illegible]
Associate Civil Engineer	Captain [illegible]
Navy Yard, Mare Island, Calif.	of Dist Div of [illegible]

Page 3 of Plaintiff's Exhibit MM



NOTE :-
YEAR selected because prior to construction of training dikes in Mare Island Strait.
MONTH Selected because of unusually Low tides

PLATE XII
TIDAL REGIMEN
MARE ISLAND STRAIT
For the Dry Season Month of
JUNE 1905
as recorded on the automatic tide gauge
AT THE CAUSEWAY NORTH OF THE
MACHINE SHOP (STEAM ENGR. BLDG.)

Compiled & Drawn by
[illegible]

Under Direction of
C. A. Carlson
Captain C.E., U.S.A.

(Testimony of Carl A. Carlson.)

WITNESS continuing: From the fact that only on two days a month the high tide and the low high tide conjoin, and from the fact that we have two different tides every day of differing heights, and the fact that tidal levels differ from month to month, due to conditions such as rainfall, wind, storms, etc., it would be utterly impossible by an observation of flowage, to say what the mean high tide level was. The average of the astronomical neap tides at Mare Island is about a half a foot below the mean high tide, but that is not the legal, technical meaning, that is the astronomical meaning. The legal neap tide is the same as the ordinary tide —that is what we call the medium tide or mean high water.

I have prepared and now produce some cross sections of Mare Island. The part of Mare Island referred to by me, on which I had run levels in 1931 and in 1917, and had found the levels of the portion of Mare Island covered by swamp and overflow 34, were lower in 1931 than in 1917, and both of those were lower than the Rousseau levels of 1906. In running those levels, the fill is shown wherever it is encountered. I place on the map an "X" across the part of 34 covered by the fill. When I spoke of the reduction of level of Mare Island in 1906, 1917, and 1931, account was taken of the fill. By 1917 the fill had not progressed very far. I indicate in blue pencil on the map by the letter "Y" the line to which [274] the fill had progressed to 1917. The line "XX" is the progress

(Testimony of Carl A. Carlson.)

of the fill to 1931. By 1906 the fill only extended to a small patch in the area adjoining the highland or fastland, which I indicate on the big chart by the letters "ZZ". I indicate with a broken line the line of the fill in 1906.

Q: I will show you this document and ask you if that is the cross section which you prepared?

A: These cross sections have been plotted by taking profiles at the same series of stations of the three maps, 1906, 1917, 1931; for the purpose of 1913, we just ran levels across at the section lines and took the elevation of the levels so that we could get a direct comparison at each profile of the variation during these several periods of years. At the same time we extended the 1931 cross section over the levees and out onto the adjoining flat land. In order to represent the elevation on a drawing it is necessary of course to use a vertical scale very much greater than the horizontal; that is the usual engineering method of making profiles, but the elevations were given so that they could be read just as accurately as if it were all on one scale. Actually on the ground one would hardly see the elevation the way they show on the profile, but the leveling instrument shows them up.

Q: Now, on the insert at the right of the map I find a line running across Section 2. Does Section 2 at the top of the column correspond to a cross section of Station 2 as it is exhibited on the map in evidence? A: Yes.

Q: Station 6 plus 20 corresponds to the cross

(Testimony of Carl A. Carlson.)

Q: Those stations, as I understand, are 100 feet apart? A: The interval is expressed in hundreds and parts of hundreds. They had to be irregular in order to miss firing points. You see, this ground is used for a rifle range, and in order to get levels that were undisturbed, we selected sections so we would miss an ob- [275] vious artificial structure, like a firing point.

Q: Then Station 2 represents a cross section of the Island 200 feet south of the north boundary of 34; Is that correct? A: Approximately. Actually, it is 200 feet south of Station O, which is the Joy monument. Q: The Joy monument, which is on the north line of 34? A: On the north line of 34.

Q. By the way, the north line of 34 represents the south line of the land that was awarded by the Irwin Case to the San Francisco Savings Union, isn't that so?

A. Yes, as established by the Joy survey.

Q. As established by the Joy survey? A. Yes.

Q. Station 6 plus 20, therefore, is a station 620 feet south of the Joy monument, which is Station O? A. Yes.

Q. Station 10 plus 40 is a station 1040 feet south of the Joy monument? A. Yes.

Q. Station 13 is a station 1300 feet south of the Joy monument? A. Yes.

Q. And Station 19 is a station 1900 feet south of the Joy monument? A. Yes.

Q. Station 21 plus 50 is a station 2150 feet south of the Joy monument? A. Yes.

(Testimony of Carl A. Carlson.)

Q. Station 24 is a station 2400 feet south of the Joy monument? A. Yes.

Q. Station 34 is a station 3400 feet south of the Joy monument? A. Yes.

Q. Station 48 is a station 4800 feet south of the Joy monument? A. Yes.

And Station 60 is a station 6000 feet south of the Joy monument? A. Yes.

Q. And corresponds to the south line of 34? A. Roughly.

Q. Roughly, of course. A. Roughly.

Q. Now, have you plotted on this cross section the levels of 1906? A. Yes. [276]

Q. 1917? A. Yes.

Q. And 1931? A. 1931 as far as there is no filling in.

Q. As far as theer is no filling in? A. Yes.

Q. What is this at the bottom of the enlarged section?

A. It is Station 2—on account of the small scale of this drawing I just had that enlarged without changing the scale or enlarging the whole dimensions, so as to develop the sand ridge more closely. It shows very distinctly. For instance, the difference between the 1906 line, 1917, and 1931 shows a remarkably zig-zag cross section, because recently, that is, within a year or two, they have taken out sand there and I walked across the ground and noticed the depression made where the sand has been dug out. For that reason I particularly took a section through that.

(Testimony of Carl A. Carlson.)

Q. Then that jagging in the line of 1931 represents the bottom of what you called yesterday the borrow pit? A. Yes.

Q. Where they borrowed sand from? A. Yes.

Q. Now on this cross section you have indicated mean high water. A. Yes.

Q. And the line of the mean high tide?

A. Yes, as now used, 5.8 above.

Q. That is .2 of an inch higher than the original mean high tide before the work of man changed it. Is that correct?

A. Not definitely; we cannot exactly tell. We know that there is a progressive change there, but how much we cannot tell. For instance, in 1925, when I was stationed at Mare Island, I used 105.60 as mean high water.

Q. That would be 5.6 above the datum plane of lowest low water?

A. Yes, and the Coast Survey monument translated into our datum plane would be about 5.8 feet, anywhere from 5.5 to 5.8 would be a fair indication of the probable change in a period of years.

Q. Now, directing your attention to the explanatory notes of this cross section I find "1931 cross sections, from a recent survey showing elevation of land. Note sunken condition of the area be- [277] tween levees as compared to the normal height of accretions on the east and west sides." What does that refer to?

A. This light dotted line is the present elevation of the land outside of the levee which on the San

(Testimony of Carl A. Carlson.)

Pablo Bay side is up higher than mean high tide than it is on the Napa River side.

Q. The broken line, then, above the line of mean high tide represents the level of the present accretions outside of the levees? A. In 1931?

Q. In 1931. A. Yes.

Q. And is the height of the levees indicated by this broken dotted line? A. Yes.

Q. That is also true on the Napa Creek side? A. Yes.

Q. And the broken line has indentations downward on the Napa Strait side; what is the significance of that? A. That is a section cut through the regular drainage sloughs on the island that drain to the Napa River side.

Q. Those are a representation of the bottoms of those sloughs? A. Yes.

Q. "Traces still remain of the original sand ridge or barrier on the San Pablo Bay side. The irregular profile of Station 2 shows the disturbed condition of the surface due to recent excavation of sand at that point." I believe you have explained that as being the bottom of the borrow pit?

A. Yes, I have.

Q. "Area south of Station 24 has been used for deposit of spoil from channel dredging. A cross section at Station 48 is representative for all of the sections in this area. Note that fill covers largely original tide lands." Now, what is the reference there? Will you explain from the map what you mean?

(Testimony of Carl A. Carlson.)

A. From the plane of mean high water to the plane of low water is the shore of our original tide land as it existed at the time the property was acquired; that is determined by the fact that the early surveys of the officers connected with the Coast Survey, who made the first hydrographic surveys of Mare Island, definitely established the location of the line between mean high water on both sides of the island. [278]

Q. "Station 48 shows an abnormal elevation due to artificial fill." What is the line of the artificial fill? Can you point out that line to us?

A. Yes. The line of 1917 in that case is above the line of 1906, and there is a considerable fill outboard on the Napa River side from the original tide line.

Q. "1906 cross sections—from a former survey, as shown on P. W. Map R. 188 (C-188) of February, 1906." That is the map that has been introduced, that has been identified as Defendant's Exhibit No. 4? A. Yes.

Q. I believe you said that was a sister map to Defendant's Exhibit for identification No. 7?

A. Yes.

Q. A companion map? A. Yes.

Q. "Plotted within the limits of the original shore line of 1852. The area between the levees is found to have been higher in 1906 than in either 1917 or 1921." Will you illustrate that?

A. Examining these sections, you will notice progressive losses in elevation between 1906 and 1917 and 1931; in some places there is a little varia-

(Testimony of Carl A. Carlson.)

tion due to the disturbance of filling the rifle range and other artificial works, but it shows up very clearly and conclusively the deterioration that has taken place within the original limits of mean high water.

Q. "1852 cross sections. These have been plotted as follows: (a) The shore lines and elevations between high and low water lines have been plotted from Alden's 1856 U. S. C. & G. S. chart, and from the replotting of the original notes (Exhibits L-20 and L-21)." Is that the source of your material for that line? A. Yes.

Q. Those were the surveys of the Coast and Geodetic Survey?

A. Bache survey at Mare Island.

Q. "The locations of sloughs, ponds, and drainage features are taken from the 1851-8 surveys of U. S. C. & G. S."

A. There is a series of surveys in evidence of that character.

Q. "The 1906 cross sections, although lower in elevation, were [279] found to retain corresponding locations of sloughs, ponds and drainage features." Is that correct? A. Yes.

Q. "Therefore the 1852 profile has been drawn parallel to the 1906 profile." A. Yes.

Q. The reason for it being that they correspond to the elevations of 1906? A. Very well.

Q. To what height does the land outside of the levee build up at present?

A. It builds up on the Napa River side about two-thirds of a foot, and on the San Pablo Bay to

(Testimony of Carl A. Carlson.)

about 1.4 feet. It might be better expressed on the river side as .67 of a foot, and on the San Pablo side 1.4 feet.

Q. Do you happen to know whether that .67 is the same height to which the tule was built up as shown on the Sloat Board report?

Mr. KELBY: I object to that as calling for the conclusion of this witness.

The COURT: Overruled and an exception. Your Sloat Board report states what?

Mr. PECKHAM: It states .67 feet also.

The COURT: Let the witness answer.

A. The Sloat Board states that the area roughly here of tule land—

Mr. PECKHAM: Q. What are you indicating on the map? A. This area.

The COURT: You say "roughly in here."

A. An area about like that.

Q. How would you get that in the record?

Mr. PECKHAM: Q. Will you indicate the line with a blue pencil please, and mark it "AA," and line of the Sloat Board?

Mr. KELBY: We object to any reference to the Sloat Board chart or map, because it has not been produced or identified here.

Mr. PECKHAM: Counsel is in error on that.

A. This is roughly—

Mr. PECKHAM: Just a minute, resume the stand, please, Captain Carlson. [280]

Q: Directing your attention now to Plan No. 7 annexed to the Sloat Board report, Government's Exhibit G, state it?

(Testimony of Carl A. Carlson.)

A: This area marked "Tule Land" is described by the board as lying generally at an elevation of .67 of a foot above the plane of mean high water.

The COURT: Q: Is that the land you were marking or designating on the large map?

A: Roughly, it is.

Q: Now, going back to the explanatory notes, "The area east of the Sand Ridge or Barrier has been averaged in the 1852 cross sections, at an elevation of .67 of a foot above mean or ordinary high water, and represents the lowest possible elevation of the low and tule land east of the barrier or ridge." What is your authority for that statement?

A: In view of the statement that in the protected region on the east side the board found no elevation of .67 of a foot, it is a very fair conclusion that the land on the other side was at least that high, if not more than that, due to the action of the water, the function that the island performs as a dividing wall between San Pablo Bay and Napa River, and also, it must be remembered that the accretions now are more recent, that is, of shorter life period, and therefore they have not had time to build up much as the original ground must have built up when it had been undisturbed there for centuries; man had not disturbed it, and there had been no hydraulic mining started in California, and no agriculture, so to speak, and the waters of Mare Island Strait and Napa River were perfectly clear, and the deposit on the beach was of sand instead of silt that comes in now.

(Testimony of Carl A. Carlson.)

Q: Under the reference "d" you have "A minimum elevation for the crest of the sand ridge has been derived from the least disturbed cross section shown on the earliest contour survey (February 1906), Defendant's Exhibit No. 4 for identification. The use of this elevation on all cross sections restores the original elevation of the sand ridge to the shore line at mean high water."

The COURT: Q: Due to the flow of the river from the Sacra- [281] mento Valley, is this silt still coming down?

A: It came down very heavily, of course, during the days of hydraulic mining, but the buoyant stuff went down San Pablo Bay. Along about 1912, or 1910, I would say, the Government built these wooden dykes out into the river to concentrate the flow of the current, that naturally caused a more rapid filling in of the original tide land.

Q: You say the river, You mean Napa river?

A: Yes. Of course, the San Pablo Bay side builds due to artificial accretions caused by Dyke No. 10, which the Government built and ran away out into San Pablo Bay, and that naturally attracts the sediment, and that is the reason that has built out so rapidly. That was the purpose of the longitudinal dyke, to trap that material.

Mr. PECKHAM: Q. I observe from the cross section 2150 feet south of Station 0, 2400 feet of Station 0, 3400 feet south of station 0, that the land now appears to be lower than the line of mean high water. A. Yes.

(Testimony of Carl A. Carlson.)

Q. To what do you attribute that fact?

A. The combination of the sediment due to the land being dyked off and also to certain loss by erosion, artificial works of man, plowing, and all operations tend to deteriorate the surface, and it is not being restored by the process of nature, which is the process by which salt marsh and swamp are built.

Q. Do your surveys and levels on those particular stations show a progressive deterioration from 1906 to 1931?

A. Very fairly, as near as such levels can do.

Q. From that can the annual rate of deterioration be determined?

A. We made a conservative estimate, and having fixed by the original surveys the original position of this land with respect to the plane of mean high water, it is fair to project that section up to its original position, and to carry the profile of the land as it now exists, making some slight allowance for the taking off of sand on the ridge; for that reason we projected the sand ridge across one of the ridges that is least disturbed, which has not been dug [282] down; of course, the 1906 Rousseau map shows these ridges in the best manner. But we have a more positive check on that, due to the natural formation of the San Pablo Bay shore. This is a complete shore; that is, it has to take the wave action and tidal action of the entire San Pablo Bay; the waves have to break against and on a beach, and that sand will go above the spring high tide, blow up and build dunes, what is known as barrier

(Testimony of Carl A. Carlson.)

ridges and dunes; that is a marked characteristic of lowlands lying the way the west shore of Mare Island does, because it is the strong prevailing wind which has a current clock-wise that brings the material on the beach, and the storm and wave action causes that to build up ridges. That is very well substantiated on the early surveys of the island made by the Coast Survey, because you will notice before the taking of their mean high water line there is a series of objects looking like tiny piles that form in between two separate barriers or ridges. The way these beaches build up, a ridge starts and then another one starts, and D. W. Johnson and Gilbert, and all the authorities on seacoast marsh formation, describe very fully this sort of beaches. The condition on the river side is different. It does not have the wave action. It is a different condition, and for that reason the barrier ridge, the sand ridge, serves as a berm or backbone, which makes it possible to build against it and accumulate material, and it is well shown by the fact that the drainage is toward the Napa River side, showing that this backbone along here is higher and causes the water to shed to the Napa River side.

Q. These lines that are indicated on this cross section are the lines exclusive of the line of the fill; Is that correct?

A. No, at Station 48, for instance, wherever the 31 section is here, it is actual present surface. Of course, it is impossible to plot in between that, because we have no data.

(Testimony of Carl A. Carlson.)

Q. As to Station 48 and 60, south of Station 0, the 31 line does indicate the amount of the fill; Is that correct?

A. It shows the amount of fill at that time. This fill, of course, is a pro- [283] gressive proposition. It is a gradual proposition. The dredging is conducted for the purpose of keeping the channel clear. We have to have wastage area for that material, otherwise we would have to haul it out to sea, so that we pump it into these basins and let it settle from one to the other. The ideal way is just to pump in a little and let it drain out and dry and settle, and in that way we get a more compact fill. If you put it all in at once it would stay a long time.

Q. Of the dredged material taken from Mare Island Straits, what proportion of it went on the original Mare Island between the original neck of the peninsula beyond 34 between the mean high tide line established by the Coast & Geodetic Survey in 1852 and the first little recorded fills?

A. The one I have shown on XX.

Q. Is that XX, or ZZ? Is that the one you refer to?

A. Yes, ZZ. It is approximately like that. Later operations extended over Station 48; that has been a progressive, gradual proposition, but of course the larger part of this fill is over the original tide land; that makes a basin to put it, and the area of the tide land outside of the line of mean high water is a larger area for all cases except that little one shown on the map of 1899.

(Testimony of Carl A. Carlson.)

Q. Directing your attention to the plan No. 7 of the Sloat Board, has any of that dredged material been put on the tule land indicated as east of Mare Island?

A. Yes, this land has all been leveed, dyked off, and filled up to, well, almost up to a yard grade all through.

Q. What do you mean by "yard grade", a yard of three feet?

A. The Navy Yard grade along the sea wall is about 110½, that is 10½ above datum or 5 feet above mean high water, in round numbers. Then we generally slope it back to the middle of the yard, where it will be 116, 115—that is about 10 feet above mean high water, so as to give drainage and sewage, etc. I can say that that land probably is above 108, that is three feet above mean high water. [284]

Q. Directing your attention to Plan No. 7 of the Sloat Board report, Government's Exhibit G, I call your attention to a line that appears on that. Have you seen the original of which this map is a photostat?

A. I have seen one of the originals—that is, this photostat is from one of the original paper drawings of the Sloat Board.

Q. I direct your attention to a little curved or meandering line at the lower left-hand end of the map.

A. That is a very light pencil line on the original drawing. Of course, the photostat brings it out, but on the drawing it is a very light pencil line, which cuts across the water line.

(Testimony of Carl A. Carlson.)

Q. Will you indicate with a blue pencil and XX the pencil line that you refer to? A. Yes.

Q. That line, you say, appears as a pencil line on the original?

A. A very faint pencil line. The drawing is in ink.

Q. The drawing itself, is in ink. A. Yes.

Q. Do you know what the practice of draftsmen is with respect to platting a map in pencil, either before or after inking it in?

A. Well, it is undoubtedly all plotted in pencil first.

The COURT: Q. What is the significance of that pencil line?

Mr. PECKHAM: What is the significance of that pencil line?

A. I don't know, it does not mean anything? It cuts across the hatching.

Q. It actually cuts across the hatching?

A. Yes. It does not mean anything. Anybody could put that pencil line on in talking about it. It has no significance, but showing up in the photostat in accentuated form it might be misleading.

Q. Directing your attention to this plan No. 7, I notice a lot of land marked with lines and cross hatching different from the cross hatching of the lines of the land on the east side of Mare Island, and the land on the neck of the island.

A. Yes. This lighter indicates grasses, such as on tilled land, and distinguished from salt marsh or low land. In other words, this would be land on

(Testimony of Carl A. Carlson.)

the table [285] land; that is, this land is either 20 or 25 feet above mean high water.

Q. I call your attention to a very heavy line on the west side of Mare Island, adjoining that land that you have described as grassy land, and ask you what that indicates.

A. That indicates a decided break in the table land; that is, the bluff breaks off sharply. Then that shows the water line, the bottom, and there the two practically coincide.

Q. In your opinion, does that represent bluff?

A. The bluff.

Q. Will you mark that with "YY", where it begins and where it ends? A. Yes.

Q. The line from YY represents, in your opinion, bluff? A. Yes.

Q. I will call your attention to a plan No. 8 of the Sloat Board Survey, and ask you what relation that bears, if any, to Plan No. 7?

A. This outline of the high land or table land very closely corresponds to this, and in making a drawing of the same scale you get the same—this is merely an enlargement of that outline of the shore. It is not developed here because this is only a plan for the Navy Yard, and the other just indicates part of it.

Q. I direct your attention to a meander line from the east shore of Mare Island, running around to the outside limits on the right of the map, and ask you if that corresponds to any line on Plan No. 7?

A. It very closely does. For instance, you can see this little jog in the line, it is duplicated right here.

(Testimony of Carl A. Carlson.)

Q. Then, in your opinion, the line that I have just indicated—and will you mark that line ZZ, at the beginning, to the outer limits of the map?

A. Yes.

Q. Now, will you mark to the line ZZ what that corresponds to on the plan No. 7? Some place down here.

Q. Now, does this plan No. 8 show the contours of Mare Island?

A. No. This is not a contour plan, but it could be used for drawing in the contours over the area that the board studied for a ship [286] lay-out, building lay-out, because you will notice it is subdivided into rectangular lines 50 feet apart, showing that they ran a line through there and took the levels all along it, and then took levels at right angles at certain places to make it possible to estimate the topography, and to estimate the proper location of buildings, and naturally how much earthwork and space would be required to locate the buildings.

Q. Directing your attention to the line ZZ, can you tell from these rectangular squares the levels that it crosses?

A. The levels running out to the ZZ line, there is one four feet, 4.2, here is one 3.6 near it.

Q. Is there any interpretation of those levels on that map?

A. Yes, the level indicated is above mean high tide.

Q. Mean high tide is shown on this map at what?

(Testimony of Carl A. Carlson.)

A. 7½ feet. But remember that is not the same datum plane as we now use. That is not 7½ feet above our plane. It is a datum that they established. We could not relocate that, but we could take an average of all the tides a month and find the plane of mean high water of all tides, both high and low, and in that way compare them. Theoretically, the average of all those planes should not vary except due to the changed conditions in the bay.

Q. These levels that this line crosses, you have said—

A. (Interrupted) These levels are inboard of the line. If you go outboard of the line you will drop down to—there is 1.67, here is 1.67. In here there was a little tidal lagoon. Up in that place is indicated a little low spot; in other words, they run a line around it and they got an elevation there, and it looks like .67—two of them .67 cross that line.

Q. Mark that or indicate that with a letter—use an "X" on that. A. Yes.

Q. On Plan 7 will you indicate the extended tidal lagoon?

A. Yes. Drainage also goes into that. There is an elevation. There is an- [287] other point .67 outboard of the same line up here.

Q. Does that line cut across any elevation higher than .67?

A. This line is not a contour line; apparently it is a line of the edge of the table land that had a varying height. For instance, over here I find one right close to the line reading about four feet.

(Testimony of Carl A. Carlson.)

Q. 4 feet above mean high tide?

A. Yes, all of these elevations speak about mean high water.

Q. The map says "The levels indicate the elevations of mean high tide."

A. Yes. Those elevations across here, you will notice here by the bluff show an elevation around 20 or 25 feet, right across; this land with the stippling indicates that is grassy high land.

Q. Can that line ZZ represent the line of ordinary high tide?

A. Oh, no, not at all.

Q. Can you state whether that line is the source of the line called line of high water or line of upland in the two maps you looked at yesterday?

A. Yes, it is. It corresponds as close as lines could to that.

Mr. KELBY: Q. The tidal lagoons to which you have referred, are they within the area or the boundaries of 34?

A. No. I was speaking about one down in here, a sort of side-hill drainage, as well as running into the salt marsh, there.

Mr. PECKHAM: Q. Do you find anything on Plan No. 7 that indicates that the line that you there marked as ZZ—just forget about this map for the present, please, Captain—the line that you marked ZZ on plan No. 7 and on plan No. 8, do you find anything on those maps to indicate that the line at the left or north end of the plans indicates anything else? A. No.

Q. Anything different? A. No.

(Testimony of Carl A. Carlson.)

Q. In your opinion, do those two lines indicate the same thing?

A. Yes. That whole shading is most positive and clear. That is a [288] very usual system of making topographical maps in those days. Instead of running contours they used a system of shading. That shading is done very carefully to indicate the degree of slope. For instance, this very close shading is run in on contours.

Q. I am going to ask you to mark this line that I point out to you now as AA on plan No. 7 of Exhibit G. A. Yes.

Q. Do you find anything on plan No. 7 of Government's Exhibit G that shows that the line that you have marked ZZ is intended to indicate anything different in character from the line marked AA?

A. No.

Q. Do you find anything on plan No. 7 that indicates that the line you have just marked AA is anything else than a division line between the table land and the salt marsh?

A. That is all, it is a dividing line.

Mr. KELBY: Q. In making that answer, did you have in mind the report which accompanied these plans? A. Yes.

Mr. PECKHAM: Q. Directing your attention again to the Sloat Board report, I call your attention to the front page of that report, page No. 1, where they refer to "No. 2, Ringgold's Chart No. 1, being a chart of the Bay of San Francisco." Have you ever seen that chart?

(Testimony of Carl A. Carlson.)

A. Yes, I have a photostatic copy of it.

Q. "No. 3, Ringgold's Chart No. 2, being a chart of the Bay of San Pablo, Straits of Carquinez, and part of the Bay of San Francisco." Have you ever see that map? A. Yes.

Q. I call your attention to "No. 6, Ringgold's Chart No. 3, being a chart of Suisum and Vallejo Bays." Have you got those charts?

A. I did not bother to bring the Suisun Bay chart, because that is outside of the Gulf of Benicia —it is outside of Carquinez Straits. It does not show anything of Mare Island or of San Pablo Bay.

Q. May I show you Government's Exhibit L-11, and ask you if that is the chart that is therein referred to?

A. Yes, that is the [289] chart.

Q. That is what chart, referring to the Sloat Board Report?

A. That is the chart designated No. 3, Ringgold's Chart No. 2, being a chart of the Bay of San Pablo, Straits of Carquinez, and part of the Bay of San Francisco.

Q. Now, directing your attention to Government's Exhibit L-13, have you ever seen that chart before?

A. Yes, that is one of the charts that belonged with the Ringgold Charts. The reference number is No. 2, Ringgold's Chart No. 1, being a chart of the Bay of San Francisco.

Q. Now, I will show you Government's Exhibit L-12, and ask you if you find that exhibit referred to in the Sloat Board Report?

(Testimony of Carl A. Carlson.)

Mr. KELBY: Of course, the report speaks for itself.

A. No. 6, Ringgold's Chart No. 3, being a chart of Suisun and Vallejo Bays. I have examined the entire set of charts published by Ringgold. There is a complete set of charts in the Library of Congress, and I have also had some photographs of the published charts.

Mr. PECKHAM: May we have this cross section introduced as Government's Exhibit next in order?

Mr. KELBY: We object to the introduction of this cross section as incompetent.

The COURT: Overruled; an exception.

(The document was received in evidence as "Plaintiff's Exhibit NN".)

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AND 830 ARE

MISSING

(Testimony of Carl A. Carlson.)

Mr. PECKHAM: Captain Carlson, in all of your studies of Mare Island Navy Yard and all your experience with the soil and the terrain of Mare Island Navy Yard, have you ever found any indication or evidence of a natural water course traversing Mare Island from San Pablo Bay to Mare Island Straits?

Mr. KELBY: I object to that as absolutely incompetent, no proper or any foundation laid. [290]

The COURT: Overruled, an exception.

WITNESS continuing: I have made a very careful study of all the original surveys and many subsequent maps and studies and there is no indication of any permanent water-way. One of the charts indicates a little drainage, such as would occur after a storm breaking through the barrier or berm, but nature objects to any water course and keeps building up the beach.

Mr. KELBY: I move that the answer of the witness be stricken out on the ground that it is incompetent, and on the further ground that it constitutes an attempt to dispute the findings and conclusions of United States Surveyor General Wagner, in respect to the land in controversy, and that it was his duty to determine whether or not this island was separated from Mare Island.

The COURT: Denied, an exception.

WITNESS continuing: The relief map was constructed under my direction to give a better visual idea of the whole situation. I have had this relief map made from the Coast & Geodetic Survey of 1884, which, in turn, is compiled upon the early

(Testimony of Carl A. Carlson.)

topography surveys in 1851, 1856 and 1858, that is, so far as the fore shore is concerned, the land between the low water and the line of ordinary high water, or what engineers term "mean high water". Then the topography of this part, of course, on a model like this, it becomes very exaggerated, so we just use a logarithmic scale. Actually, this land is very high and, of course, of no value. These little bumps are exaggerated in order to give a vertical scale; in other words, this vertical scale had to be plotted so as to make the thing visible. That is the practice in making models. So this particularly brings out the location of the fore shore, the area reached by the daily tides between low water and the line of mean high water. That forms the physical side walls of the island; in other words, physically we go down to low water line to find out what the island is as a mass, and we find here from the hydrographic surveys sound- [291] ings had been carefully taken and plotted, so we are able to determine the position of the fore shore with the greatest of accuracy. That is the most accurate determination that is made. No other type of surveys except the hydrographic surveys will develop the fore shore. We use the same system of taking soundings in our dredging work to determine the actual inside slope under water of this topography. That same method of soundings over here determines the location of the fore shore. Then we find a remarkable uniformity in this San Pablo sandy shore. The material is carried along by the current and piled up against it and forms a sandy beach. The tide goes out, the

(Testimony of Carl A. Carlson.)

sand dries, the prevailing afternoon wind begins to blow it up, making dunes, the wave action keeps piling it up, and we get one or more ridges or berms. I have not attempted to make a detailed representation; it would be too complicated. This just gives a general idea. For instance, up here there is indicated in blue what is known as Long Pond. From the map that Long Pond indicates a depression between, say, two ridges, one an older ridge, because this sort of shore builds up gradually. It is trying to do that same thing today with this silt, but the silt is such poor, light material it does not build as well as sand. Then it shows a decided drainage toward Napa Creek. If this land were not high enough to withstand the action of the waves against it, it would be all swept away, there would be no vegetation; all you would have would be a reef. This is a powerful body of water coming down here, and if it came across this beach it would do so; in fact, the Government has several times figured on trying to cut through here, but if they cut a 10-foot channel through here it would cost too much money; you would have to build a restraining wall away out here to keep this little current and drift from filling it in. Otherwise, it would choke right up.

WITNESS continuing: The source of the material for this map was the Hilgard 1884 chart, which is a composite of the early sur- [292] veys. Some of these are rough sheets, fragmentary.

Defendants' Exhibit for identification "10" is without doubt a blue print of the same map and has very complete soundings through Napa Creek and

(Testimony of Carl A. Carlson.)

off the San Pablo Bay Shore. It also shows a very flat area because it takes so much to drain it and, of course, the sloughs get large at the mouth and then they diminish rapidly. Along here you can see the little parallel ponds. Here is the long pond showing very well the characteristic formation of the beach fronting a marsh. Here is another one. Here, and here is one in here, with a little island shown there.

Mr. PECKHAM: We offer the relief map and the Hilgard map as exhibits for the Government next in order.

Mr. KELBY: Let me make an inquiry with respect to the witness' qualifications, if I may, with the consent of the Court.

The COURT: Go ahead.

WITNESS continuing: I selected the map known as the "Hilgard Map" because we considered it had on it all of the features that could be reproduced on a single model. By "we", I refer to Mr. Greathead, who was my assistant at that time, in immediate charge of making the model.

Q. So it was merely your opinion and that of your assistant at that time that this was representative of all of the maps showing it, prior maps?

WITNESS continuing: We did not got at it from that point. We considered this a suitable map to use for making the model to develop this drainage system which has been shown on other maps. The map marked "Defendants' Exhibit 10 for identification" is based upon an actual survey. The survey was not made by Mr. Hilgard. He was the superintendent, the director in Washington. He did not make any

(Testimony of Carl A. Carlson.)

surveys. The surveys were made by the original officers, like Cutts.

Q. So that it is a compilation that is based on prior maps? [293]

A. All maps are until you get the original, which we have already in evidence. The relief map here is an expression of my own opinion, that is, a professional opinion based upon a great deal of study of early records wherever found, the testimony of people who lived on the island in the early days. These records re- [294] cords regarding it all confirm and check with the observed characteristics of marsh land portrayed on it.

Q. So that this relief map is not only expressive of your own views, your inferences from maps that you have examined, but also of statements and declarations made by those who were alleged to have been familiar with the island in early days?

A. It checks, you might say.

Q. And from data on file in your office?

A. Collectively, but the basic data for the sand ridge and all of that, we have, for instance, in the Rousseau Map.

Q. These green spots indicate vegetation?

A. Yes. Of course, you understand that in pools like this the tide will back up and it will leave bare spots with a sort of red weed in it. Where there are tules along here, and along here on the Napa River side, you will find more of the salt marsh grass growing on the San Pablo Bay side. For instance, I was out there last fall and right along here picked up samphiers still growing on 34.

(Testimony of Carl A. Carlson.)

(The relief map was received in evidence as "Plaintiff's Exhibit OO".)

(The Hilgard Map was received in evidence as "Plaintiff's Exhibit PP".)

Mr. KELBY: To the introduction of it we object on the ground that it is incompetent, no proper foundation laid, no opportunity for the defendant to examine any of the data upon which it is based, and which entered into its composition.

The COURT: I understand it is all in evidence, is it not? A. Yes.

Q. All of the data is in evidence?

A. Substantially, yes.

Mr. KELBY: The declarations of these persons, I understand are not in evidence.

The COURT: I understand that the declarations of these persons that were mentioned were simply for the purpose of checking up, isn't that so?

A. For checking our study. [295]

The COURT: Overruled; an exception.

Mr. PECKHAM: If your Honor please, at this time, for the convenience of the Court, I would like to offer as companion exhibits to the relief map two photographs of the relief map, one of the map as it is, and one with Swamp and Overflow 34 imposed upon it.

Mr. KELBY: We do not object to that because of any infirmity which inheres in it, but we do make the objection that it is incompetent, and immaterial.

The COURT: Overruled; exception.

(The photographs were marked as part of "U. S. Exhibit 00".)

WITNESS continuing: The north line of 34 on the relief map corresponds to the Navy Yard fence

(Testimony of Carl A. Carlson.)

at the present time and everything north of that was land that is covered by the case of San Francisco Savings Union vs. Irwin. Where that fence comes across, you can go out there and by taking samples of the sand—I have observed it—I have not been out there recently, but I have an airplane map that I saw yesterday showing that very clearly. You can also take samples of the sand here, the same as we have taken samples here, but I have not personally done it this year.

Q. Were you out there in July of last year.

A. Yes.

Q. At that time did you actually see that sand barrier? A. Yes.

Q. About how high was it above the level of the rest of the ground at that point?

A. About waist high when you stand in back of it.

Mr. PECKHAM: Q. Now, Captain Carlson, does swamp and overflow 34 fall within the lines of the Freeman survey? A. Yes.

Mr. PECKHAM: We offer in evidence from the records of the Navy Yard the letter of John Rodgers, Rear Admiral and Commandant, dated February 4, 1873, to Robert Gardner, Esq., Register, State Land Office, Sacramento, California, also letter from the Surveyor General of the State of California, Robert Gardner, to Admiral [296] Rodgers, U. S. Navy, dated November 25, 1873.

Mr. KELBY: I object to that as immaterial, irrelevant and incompetent. The Supreme Court of the United States paid very little attention to it in the San Francisco Savings Union vs. Irwin.

The COURT: Overruled, an exception.

(The letters were received in evidence as "Plaintiff's Exhibit QQ".)

PLAINTIFF'S EXHIBIT QQ.

[Endorsed]: Filed May 4, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES NAVY YARD
Mare Island, California

I hereby certify that the next photostat copy of letter from the Commandant, Navy Yard, Mare Island, California, to the Registrar, State Land Office, Sacramento, California, under date of November 24, 1873, is a true and literal exemplification of the record on file in the Public Works Office at Mare Island, California.

RALPH WHITMAN,
Public Works Officer.

August 11, 1931.

Navy Yard, Mare Island, Cal.
November 24th, 1873.

Robert Gardner, Esq.,
Register, State Land Office,
Sacramento, Cal.

Sir:

My attention having been called to the fact that certain parties hold certificates of purchase from the State of California to the tule land of Mare Island.

The purchasers at some future time will probably apply for patents for the same.

I feel it my duty hereby to notify you that this land is claimed and occupied by the U. S. under order from the Navy Department of the U. S. at Washington, D. C. the same having been purchased January 4th, 1853, after the Commissioners of the U. S. under the Act of Congress, approved March 3d, 1851, had confirmed the title under which the U. S. now holds the land.

I further feel it my duty to protest against any action antagonistic to the ownership and possession by the Navy Department of the U. S. of Mare Island and the tule thereto belonging, as well as in the words of the deed—"its waters, creeks, harbors, bays and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging.

I am,

Very respectfully,
(Sgd) JOHN RODGERS,
Rear Adml. & Commandant.

A chart showing the property held and occupied by the U. S. is herewith enclosed.

UNITED STATES NAVY YARD
Mare Island, California

I hereby certify that the next photostat copy of letter from the Surveyor General, State of California, Sacramento, California, to the Commandant, Navy Yard, Mare Island, California, dated Novem-

ber 25, 1873, is a true and literal exemplification of the record on file in the Public Works Office at Mare Island, California.

RALPH WHITMAN,
Public Works Officer.

August 11, 1931.

STATE OF CALIFORNIA
OFFICE OF
SURVEYOR GENERAL

Sacramento, Nov. 25th, 1873.

Admiral Rodgers,
U. S. N.

Sir:

I have the honor to acknowledge the receipt of your protest against the issuing of patents by the State, for certain lands sold as swamp & overflowed, adjacent to Mare Island. It has been placed on file with the accompanying map, showing the land claimed by the U. S.

Respectfully,
(Sgd) Robert Gardner,
Surveyor General.

Commandant's Office. Received Nov. 26, 1873.
Navy Yard, Mare Island, Cal.

Mr. PECKHAM: We offer in evidence Defendant's Exhibit for identification No. 4, and the companion map for identification, No. 7, and ask that the two be annexed and marked as one exhibit.

(The documents were received in evidence as "Plaintiff's Exhibit RR".)

We next offer in evidence a letter from Edward T. Nichols, Chief of Bureau of Yards and Docks, to Honorable William E. Chandler, Secretary of the Navy, Washington, D. C., dated December 22, 1883.

Mr. KELBY: We object to that as absolutely incompetent and that it is cumulative anyway.

The COURT: Overuled, an exception.

(The letter was received in evidence as "Plaintiff's Exhibit SS".)

PLAINTIFF'S EXHIBIT SS

[Endorsed] Filed May 4, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

UNITED STATES NAVY YARD
Mare Island, California
10 August 1931

I hereby certify that the annexed five (5) sheets are photostatic reproductions of a copy of a letter from the Chief of the Bureau of Yards and Docks, Navy Department, Washington, D. C., to the Secretary of the Navy, Washington, D. C., dated December 22, 1883, on file at the Navy Yard, Mare Island, California.

[Seal] RALPH WHITMAN
Public Works Officer.

BUREAU OF YARDS AND DOCKS
No. 55

Navy Department,
Washington, D. C.
Dec. 22nd 1883.

Sir:

In compliance with the endorsement of the Judge Advocate General upon a letter from the U. S. District Attorney of California S. G. Hilborn, dated Dec. 5th 1883; I respectfully reply.

It appears from Mr. Hilborn's letter that a Suit has been instituted against the Government for the recovery of a large tract of tule land, a part of Mare Island, California, upon which the Navy Yard is located; and of which it has been supposed the United States was owner by purchase. Mr. Hilborn applies for a copy of the field notes and Survey of Mare Island (Original Survey) in the hope that it will show this swamp or tule land was embraced in said Survey.

Mare Island was selected and recommended as a suitable location for a Navy Yard in 1852, by a Board of Officers appointed for that purpose by the then Secretary of the Navy. After diligent and careful search the only "plat of Survey of Mare Island" made by this Board, that can be found in this Bureau, has the following title

"Plan of Mare Island, California, showing the topography and soundings through Mare Island Strait. To accompany the Report of the Board appointed to select a site for a Navy Yard in the

Bay of San Francisco, 1852," and signed:

John D. Sloat.
Wm. S. Ogden, Com'dr. U. S. N.
Simon Fraser Blunt, Lt. U. S. N.
W. P. S. Sanger, Civil Engineer.

This plan embraces only that portion of the Island lying opposite the City of Vallejo, and is evidently the one accompanying the "Report of the Board". Said Report is not on file in this Bureau and cannot be found. All the "field notes" to be found, are embraced in four books and consist entirely of angles and soundings of no value whatever, unless they could be referred to the "Original plan"; the one in the Bureau is undoubtedly a copy of the original. This plan does not show the "tule" or "Swamp land" in dispute, though it does show a junction of this tule with the Main Island. A coast Survey map of 1850, which was in the possession of the Board, shows an immense body of tule, joined to (and extending in a North West direction from the high ground of) Mare Island, and the whole extent entirely surrounded by water.

Lieutenant Simon Fraser Blunt, one of the Members of the Board to select a site, was one of the Officers who made this Survey, two years prior to the organization of the Board.

A decree of confirmation to George W. Bissell, et al, on file in the U. S. Surveyor General's Office, San Francisco, closes as follows, "the place of which confirmation is hereby given, is situated in the Bay of San Francisco, and is called "Isla de la Yegua" or Mare Island, and being an island is bounded by the water's edge."

December 13th 1852, the Secretary of the Navy, Hon. John P. Kennedy, addressed the Board as follows, in regard to the value &c. of this Island:

"I desire to have your estimate of its value, with all its appendages and advantages, regarding depth of water harbors &c." On the same date the Board replied as follows: "The Island, including the tule opposite Vallejo, contains about nine hundred acres, in addition to a large tract of tule extending towards Napa and Sonoria."

I have italicised a portion of the above reply, to show that the direction indicated corresponds with the direction given to the tule in the Coast Survey map of 1850.

It seems perfectly clear, from all the circumstances, that this disputed tule land, was considered by the Board, a part and parcel of Mare Island, and was so included in the purchase.

The decree of confirmation which I have cited, bounds Mare Island by the "water's edge." The Coast Survey map before described shows this tule land and the solid portion of Mare Island, as one continuous body surrounded by water.

The letter of Mr. S. G. Hilborn, is herewith returned.

Very respectfully,
Your Ob'dt Serv't,
ED. T. NICHOLS,
Chief of Bureau.

Hon.
Wm. C. Chandler,
Secretary of the Navy,
Washington, D. C.

(Testimony of Carl A. Carlson.)

Cross Examination by Mr. Kelby.

The Sloat Board used the Ringgold Charts as the general plan of Mare Island. That is related to in the Board Report. I do not know from that whether that Board prepared a map or not. I use the term "map" differently, perhaps. I use the term "map" for a chart or something that indicates the location. I have seen the chart of San Pablo Bay, showing Mare Island, in addition to the other maps which are identified as Plans 7 and 8, which purports to have been prepared and adopted by that Board. Lieutenant Blunt, who was a member of the Board, worked on that two years before the Board got there. I don't know where the original plate is, but the published [297] charts are still in existence, that is, the two Ringgold charts, which were the foundation of that survey by Blunt, but other than that, I could not say one way or the other, that there was a separate map of Mare Island prepared by Blunt.

Q. Did you ever see any map of Mare Island which purported to have been made by the Sloat Board. A. Yes, the Ringgold charts.

WITNESS continuing: Lieutenants Blunt and Cutts worked on the Smith Board prior to the arrival of the Sloat Board and they were working for the Sloat Board getting this data ready so that when the Sloat Board came out they had a number of sites to examine and they were not going to make an entirely new map when one had been in the course of preparation for the last two years. I don't know whether they produced or made a map or chart that was founded on the Ringgold survey.

(Testimony of Carl A. Carlson.)

I have never seen any map or chart of that kind. The others, 7 and 8, are just plans and are referred to in the report which I have identified. The tidal readings to which I have referred were not kept from data in the Mare Island Navy Yard, but were prepared from the data on record at Mare Island. Mr. Greathead assisted me in that and he is fairly familiar with all of that type of work.

The object of the reconnaissance made by me together with Mr. Peckham and others in July of last year was, I wanted to see where the point was where they turned off to pick up the north end of the island. I indicate the point on the chart with an "O". When I arrived at that point, we wanted to locate it first as Joy located it, as near as we could. We turned off north something, .70 something west —we turned off at this angle. That terminated 800 yards distant, we found from here up to the Bascule Bridge, crossing Sonoma Creek. I got my basis for the 800 yards, I think, from the instructions and notes of Joy. My object was to locate this point in reading that angle—I got the angle to this line, that is as far as the bearing goes. It would be 70 something west, [298] that is, the total angle from the north and south is about 70° west of north—due west would be 90°.

Mr. PECKHAM: With counsel's permission, I just want to introduce a couple of questions.

Captain, you testified to certain lines run on the levels in the year 1917. I call your attention to a map from the record of the Navy Yard, showing such contours: Is that the contour map that you had made and surveyed at that time? A. Yes.

(Testimony of Carl A. Carlson.)

(The document was received in evidence as "Plaintiff's Exhibit TT".)

WITNESS continuing: All of these levels, Rousseau's level of 1906, my own level of 1917, and the level of 1931, were all after the reclamation of that land by Cross. Cross, to my knowledge, had no connection with the Government in any way.

Mr. PECKHAM: We would like to offer also a copy of a Sheriff's Deed to Edwin H. Sawyer under date of 1870, recorded in L-1 of Deeds, page 423 of the records of Solano County. This is not certified.

Mr. KELBY: I do not object to it because it is not certified.

Mr. PECKHAM: I would ask that this be admitted as part of Government's Exhibit W. There is another exhibit, Defendant's Exhibit 11 for Identification, which contains a plat of the Freeman Survey, which is neither of our plats.

Mr. PECKHAM: There is another exhibit, Defendants' Exhibit "L" for identification, which contains a plat of the Freeman survey, which is neither of our plats, signed by Superior General Ames and certified by John O'Connell. We would like the privilege of substituting the original, together with any correspondence that is attached to it, if it can be found in the land office.

Mr. KELBY: Proved also that it be the original of that map.

(The map, Defendants' Exhibit 11 for identification, is received in evidence as "Plaintiff's Exhibit UU".)

(Testimony of Carl A. Carlson.)

Cross Examination Continued. [299]

Mr. KELBY: Captain, it may be interesting to you to know that I believe entirely in your competency, as well as your integrity, but still we are desirous of finding out the object of this reconnaissance in July, last year. Now, you started out to find the east line, did you?

A. We went out to locate that point on the Joy Survey, which is a re-running of the Dyer Survey.

Mr. KELBY: We still assume that this is the description contained in the Executive Order of President Fillmore, and which I believe is postulated on the Smith Survey Report, "The land on the Eastern side of Mare Island straits beginning at the high hills *be-* between those straits and the City of Benicia, about 2000 to 2500 [300] yards from the former, and extending in a line nearly parallel to it, to a point opposite the northern extremity of Mare Island, and thence to the Straits so as to joint them at a point about 800 yards north of the northernmost high hills on the eastern side of the Straits." Is that what you started out to do, to establish those stations?

A. I indicated the point where the Dyer and Joy survey established the point, where this line turns off that runs to the river. I testified that we set up the instrument and pointed it off some 70 degrees and picked up the Bascule Bridge on Sonoma Creek.

Q. What is the reference to the Bascule Bridge in the language that I have just read?

A. That is approximately the northern end of Mare Island.

(Testimony of Carl A. Carlson.)

Q. What do you mean by "Mare Island"?

A. The physical high land.

Q. By the physical high land, you mean the entire island. A. Yes.

Q. Up to the northerly boundary of 569?

A. Well, up to the water boundary with Pacheco Creek. That is the boundary indicated on the chart.

Q. Why did you establish the point of commencement coincident with the letter O? Where did you derive that from?

A. Because that is in the Dyer and Joy Survey; they establish that point. I just tried to roughly relocate it for a reconnaissance.

Q. Did you draw a line from that point in any direction? A. No.

Q. You just simply tried to see whether you could see any distant point westerly from that?

A. Well—

Q. Tell us about it, Captain, in your own language.

A. I swung off some 70 degrees from the north and south line, which was also the bearing of that old line up to the Napa River, and it practically coincides with the ridge for that sort of an examination.

Q. Now, Captain, if I understand you correctly, the levels of 34 have been constantly declining ever since you became familiar with them: Is that correct?

A. Well, ever since the 1906 records, and probably it has continued long before. That settling is

(Testimony of Carl A. Carlson.)

due to prob- [301] ably two major causes or two things. The major one is the dyking off and the robbing of the land from the normal overflow. The accumulation of debris, hydraulic mining and other debris, also built up a partial barrier, cutting it off, and then, of course, the work of man on that area, interfering with the robbing of the land, is very detrimental, because after Dr. Cross built his dykes, it introduced a very severe condition; he checked off and left a place that was cut off from the normal flood waters, and all that.

Q. Did this dyke extend along 34 longitudinally?

A. It went outboard of 34 quite a bit. It was extended on the accretions that were formed since the '50's, that is, since the original surveys were made.

Q. These surface reductions have been constantly progressive since what date—1906?

A. In 1906 we have a definite survey record.

Q. And if those declinations shall continue in the same ratio, it won't be very long before you will be entirely below the sea level in that vicinity, will it?

A. That is a problem I would not want to answer offhand. The rate of subsidence, of course, will gradually diminish. It will depend upon the material underlying 34, the relative amount of peat and sand or silt in the soil. I had a conversation upstairs with Captain Whitman, and he tells me Mr. Greathead and himself are the only ones that can bring such data if it exists. We have some records to illustrate the extent of the fill, and the next wit-

(Testimony of John F. Greathead.)

ness, I think, will throw some light on that. If you mean the cubic yardage, I doubt if they have any record at the yard, for the reason that the fill was simply a by-product of the dredging of the channel.

The COURT: Let a search be made and if you have it, produce it.

TESTIMONY OF JOHN F. GREATHEAD, A Witness for Plaintiff.

I am a civil engineer by profession and have been attached to [302] the Engineering Department at Mare Island since 1918. Prior to that time, I worked for the Subway Companies in New York and Philadelphia; and prior to that my experience has been, briefly, four years designing and constructing dams on the Barge Canal of New York, six years assistant engineer in charge of subway construction in New York, one year as Division Engineer on the Philadelphia Subway.

I am familiar with the Freeman Survey, also with Swamp and Overflow Survey 34, also with the Coast and Geodetic Survey on Mare Island. The swamp and overflow lies within the limits of the Freeman Survey and also lies within the Coast and Geodetic Surveys of Mare Island and within the high water line as determined by the Coast and Geodetic Survey.

Q. Directing your attention to the Government's Exhibit "H", I call your attention to the two plattings here of swamp and overflow survey 34 and

(Testimony of John F. Greathead.)

ask you if the survey in red properly responds to the physical outline of Mare Island?

Mr. KELBY: I object to that as calling for the conclusion of the witness. The map, itself, is the best evidence.

The COURT: Overruled, an exception.

A. The area indicated in red here is not the Wade Hemecourte—

Q. That is the Darlington Survey? A. Yes.

Q. The Wade Hemecourte Survey is the area on which the Darlington patent issued?

A. It was a survey of this land by Patton and resembles in all except unessential details the official plat and the location indicated on this map in red closely resembles the original shores of Mare Island as shown on the Coast and Geodetic Plat, I have made this big chart of the Joy survey. It is a map not only of the Joy sectioning, but all of the sectioning within those confines. We secured certified copies of all of the township maps and inserted them in their proper place. The delineation of Swamp and Overflow 34 is shown on that map as a sort of greenish blue line. I tried to indicate it in the position which was undoubtedly in the mind of the original County Surveyors; I could not use their ties to section corners as they were not the official section corners [303] at that time.

Q. Have any section corners ever been erected that those correspond to?

A. The point of beginning of the four parcels which constitute Survey No. 34 have not been officially established.

(Testimony of John F. Greathead.)

Q. The depiction of that upon the map of Mare Island is by taking physical monuments where physical monuments are mentioned and using points on the survey to accord with those physical monuments? A. That is correct.

Mr. PECKHAM: Q. And one of the calls of that Darlington survey was as it ran following the sinuosities of the upland? Isn't that so?

A. Substantially.

Q. The south end of the Darlington survey did follow the sinuosities of the upland, and you have simply pivoted that line, that point, on the engineering building, and swung the map to correspond with the shore lines of Mare Island?

A. To elaborate just a little bit, I took the surveys of 569 and 34 under consideration at one time; they have a common boundary; so, fitting the two together, I swung the two together about the upland that they pivoted upon, so as not only to show 34 in its proper position, but also the adjacent 569, in fairness to all concerned.

Q. The purpose of that was definitely to locate this land on Mare Island on the land rather than to follow the section and Government subdivisions as mentioned in the Darlington survey: Is that correct?

A. Yes, except that the Darlington survey notes did not, of course, refer to Government subdivisions, but to section lines, that in the absence of any official ones were located by the county engineers in their own manner, which turned out later not to be the official manner.

(Testimony of John F. Greathead.)

WITNESS continuing: I am familiar with the lay of the land at Mare Island at present. The airplane map at Mare Island, Government's Exhibit "HH", which is now shown me, is an excellent photograph of the present conditions at Mare Island. I am familiar with [304] the Rousseau Map of 1906, which has been marked Government's Exhibit "RR", and with respect to the line and contours on said map, marked "Sand and Shell Ridge", state that it represents the remnants of the original sand ridge which lay at the upper part of the westerly beach and portions of it are still to be found in that location. I have recently made a study of the remains of that beach. I was greatly interested in seeing upon the airplane map what appeared to be a line of beach. It was so plain that I went up to the northerly end of the present area and observed that there seemed to be on the easterly side of the cultivated area a line of white area which conceivably might be the picture of the sand dunes. It was so plain that I went out to the side and viewed it from a distance of 500 feet to the west of the road and was surprised to find the sand dunes standing up in a way I had never seen before, by reason of the fact that fresh grain, I think it was rye, had grown up through the sand, but in growing over the sand, left the white sand plainly visible as a band extending as far as you could see, so I took samples of the sand and analyzed it for sand content. I went only four hundred feet into Survey 539, but took samples along the trail shown on the photograph all the way down to where artificial fills made it im-

(Testimony of John F. Greathead.)

possible. In other words, twenty-four hundred feet south of the north fence.

The line of wider area on that map represents the artificial fill from dredging and samples were taken down at that line. The north limit of 34 substantially is the present fence, which I have marked on the map as "AA", and is determined as the common boundary between 539 and 34 by the Joy Survey.

Mr. KELBY: Might I ask a question before you go into another subject?

Mr. PECKHAM: Yes.

WITNESS continuing: About 400 feet westerly of the old sand ridge, paralleling the San Pablo Bay Shore is an artificial eleva- [305] tion, a dyke was running longitudinal with that beach section perhaps 400 or 500 feet west of it. There is also a levee east of it, entering Napa River shore line. There is no levee closer than 400 feet to the sand beach at the north end of the reservation. I paced the width of the sand, which was quite loose, and which could be kicked up with the foot and it paced fifty to sixty feet. The levee west of it shows plainly on the map. It shows in the picture. These white lines in the photograph constitute the traces of the old sand ridge and let us say 400 feet west of it is the levee, on which is the road. The land in between is cultivated. The road starts at the Navy Yard and comes up there—then you pass the Rifle Range. It is only in fair shape outside of the gate to the fence of the reservation to the junction with the privately owned Pedro Point Toll Road. The sand is shown by these white spots or diamonds. To bring out the nature of

(Testimony of John F. Greathead.)

the soil, I not only took samples along this sand ridge, but also a few at odd points elsewhere and the rest of them are loam, but just along there you have from 80 to 100 per cent sand. The levees that I have just referred to lay within the accretion of 34 and are on the westerly side of Mare Island for a distance of two miles. The levees are simply to keep the soil from being washed out into San Pablo Bay.

Q. Will you produce your plat showing the stations from which you took those samples?

A. Might I say that I have with me today only a series of samples of sand taken on the 8th of August, 1931? However, a dozen of them were taken haphazard at even stations. On the 1st of April, 1932, after I had made this inspection of the ground, I took many more samples, and these are not here today, but they have been platted as to sand analysis.

Mr. PECKHAM: Do you want to see the chart?

Mr. KELBY: I do not see how that would help us, as we are not claiming any sand on 569.

Mr. PECKHAM: Does that plat indicate samples taken from 569 or from 34?

A. Most of the samples are on No. 34; just a few odd ones are taken on 569. [306]

Q. This station O, station 1 plus 15, 2 plus 65, 4 plus 50—

A. (Interrupting) Those stations or figures represent the 100 feet, or 200 feet, or 400 feet plus 50, in the usual engineering manner.

Q. Is that the usual engineering manner?

A. Yes.

(Testimony of John F. Greathead.)

Q. Starting from O, you get on the north line of 34, which is close to the Joy monument? A. Yes.

Q. So that station 1 plus 15 means 115 feet south of that monument? A. Yes.

Q. 2 plus 65 means 265 feet. A. Yes.

Q. And so on down to station 23 plus 80, which brings you to a levee? A. Yes.

Q. Did I understand you to say that you took samples of sand in all of those locations? A. Yes.

Q. What percentage of sand did they run?

A. They run from 25 per cent, sand at the most southerly end to 100 per cent.—most of them are above 80 per cent., with the exception of a few samples not taken along the sand ridge, but elsewhere, as located on this map from a comparison.

Mr. KELBY: Q. That is all from the accretion portion of the land, is it not?

A. No, the bulk of the samples were taken along the sand ridge which was the westerly boundary of Swamp and Overflow Survey No. 34, from the description and field notes of the original survey.

Mr. PECKHAM: I offer that in evidence as Government's Exhibit next in order.

Mr. KELBY: I object to that as incompetent.

The COURT: Overruled, and an exception.

(The document was marked "Defendant's Exhibit VV.")

WITNESS continuing: One of my duties is to investigate the tidal data at Mare Island. The datum plane at Mare Island is 110½ feet below the top of the drydock No. 1. It was originally the Navy Yard monument. This incidentally formed the datum for

(Testimony of John F. Greathead.)

one of [307] the minor Coast and Geodetic Survey determinations of the tidal plane. This datum has primary connection with tidal plane. It is the physical distance down from the top of the stone drydock. It was intended to make that coincide with mean lower low water and it does, but should mean lower low water fall in the future, as perhaps it has in the past, our datum would still be fixed at 110½ feet below the top of that stone drydock. It is a mark made by the Navy Yard, but the Coast & Geodetic Survey for four and one-half months made tidal observations at that point, adopting the Navy Yard's monument. The Coast & Geodetic Survey have their own monument at the southerly end of the Navy Yard.

This bench mark is an object permanently fixed at a specific level from which an engineer may run the levels and determine their datum plane anywhere on the island. The mean high tide level above the datum plane at Mare Island is the average of six years' and eleven months' observation, a very good series gives that elevation as 105.8 feet above the datum plane. The datum plane is one hundred feet below the present mean of lower low water. I know the line of the Dyer Survey of 1863, which is their survey establishing the boundaries of Reservation No. 7 of President Fillmore, in the year 1862. That line was resurveyed by Joy in 1923, in connection with the sectioning on the easterly side of Mare Island Straits. It was necessary to re-run the Dyer Survey as you see his lines come down to that reservation line and stop. All lines that come down

(Testimony of John F. Greathead.)

to the boundary line of Reservation 7 are Joy's lines.

Q. Does the Joy re-survey of that line coincide with the Dyer Survey?

A. In his notes he says he relocated it as accurately as it may be. I have picked up the line of the Dyer Survey to find the initial point that Dyer mentioned. I have a plat of that, which I made November 6, 1931, which I now produce. I think I found the north line of Reservation No. 7 with pretty good accuracy. From the northerly angle point of Reservation No. 7, pointing the *tele-* [308] *after* a solar observation along the true bearing of the Dyer Survey which was north 76 degrees 30 minutes west, we found that that northerly line prolonged to Sonoma Creek was very close to the Bascule Bridge on the Sears Point Road which crosses that creek. *Thine* line did not cross Swamp and Overflow Survey 34 at any time. It was about four-fifths of a mile north from the nearest point of it; that is, 4/5ths of a mile north of the north boundary of Swamp and Overflow 34.

(The document was received in evidence as "Plaintiff's Exhibit WW".)

Mr. PECKHAM: Now, if your Honor please, we would like to offer the big long map as Government's Exhibit next in order: For the convenience of the Court, we submit also with the same number a photograph of the exhibit.

Mr. KELBY: We object to the introduction of this map except for illustrative purposes. We are perfectly willing it should go in as an aid to the Court, but not as evidence in this case.

(Testimony of John F. Greathead.)

The COURT: It is offered for that purpose, as I understand it.

Mr. PECKHAM: Yes, that is all.

(The map was received in evidence as "Plaintiff's Exhibit XX".)

Cross Examination by Mr. Kelby.

I am not thoroughly acquainted with the details of Mr. Joy's activities in 1923, and back in that vicinity. He sectionized on both sides of Mare Island Straits and Napa River and I have seen his notes that pertain to Reservation No. 7, but it appeared to me evident that in terminating his section lines adjacent to Reservation No. 7, he had to re-run the boundary line of that reservation, which he did.

I understand that he extended the section lines to land embraced in Survey 34 and that they were disapproved.

Q. Do you know by whom they were disapproved? A. I do not.

Q. Do you know whether they were disapproved?

A. I do not even [309] know that, I simply have been shown a map which is not an official map, that it seemed to show that he ran his sectionizing farther than he had been instructed to and I was informed that he had been told to remove the evidences of that survey.

Q. Is that your own information, that it was disapproved by someone having authority to disapprove it?

A. No, I think I am not a competent witness on that matter.

(Testimony of John F. Greathead.)

Q. In other words, you don't know—is that it?

A. Yes. I do not know whether there is any difference between the term "sectionized map" and "subdivision map". I am not an expert on those technical terms either, which are General Land Office terms. I could not say that I would be an expert or familiar with what is known as a subdivisional survey.

Q. And yet you are a surveyor and civil engineer?

A. Ordinarily I would consider that a sectionized map was one which showed the township lines and the section lines.

Q. I show you a photostatic copy of a map or chart that I have marked for identification as "Defendant's Exhibit 12", and ask you to state what it is, if you know?

A. I would rather have you ask an expert in the Land Office the difference between this and an approved survey.

Q. Does it depict a subdivisional survey?

A. Yes, it depicts a subdivisional survey.

Mr. PECKHAM: I offer in evidence criticisms of the map of 1854, as shown by the experts from the records of the State of California.

Mr. KELBY: To which, of course, we make the general objection, it is immaterial, irrelevant and incompetent.

The COURT: Overruled, an exception.

(The document was received in evidence as "Plaintiff's Exhibit YY".)

PLAINTIFF'S EXHIBIT YY.

[Endorsed]: Filed May 5, 1932. United States District Court.

Filed Jun. 18, 1934. United States Circuit Court of Appeals.

MEMORANDUM CONCERNING THE OFFICIAL MAP OF THE STATE OF CALIFORNIA OF 1854.

Concerning the Official Map of the State of California of 1854 (defendants' Exhibit No. ——), the annual reports of the State Surveyor General for the several years immediately preceding and following the publication of the map contain much information as to why and wherefrom the data and material from which the map was compiled were secured. These annual reports also contain reports of the various county surveyors on the subject matter. The following extracts of these annual reports of the State Surveyor General are here set forth for information and convenience.

The report of the State Surveyor General, dated December 15, 1852, published as Senate Document No. 3, (Session of 1853) and printed as an appendix to the Journal of the Senate (4th Session) contains the following information concerning the official State Map:

p. 3. "STATE MAP—THE PROGRESS OF ITS CONSTRUCTION.

The last Legislature, near the close of the session, passed an Act to 'provide for a map of the State,'

and appropriated the sum of three thousand dollars to carry out the work.

In a special report made from this office (in answer to a call from the Senate) on the 18th of February last, I set forth the importance and necessity of a correct map, and submitted an estimate of the amount that would be required to get one up. In the month of April a bill was introduced into the Senate, ordering me to compile as correct a map as could be made from data to be collected from various sources; this bill unanimously passed that body appropriating the sum of eight thousand dollars to carry out the design, but was met in the Assembly by a strenuous opposition, and the appropriation cut down to three thousand dollars.

Though it was well known to the friends of the bill, that this sum was totally inadequate to carry out its provisions in full, it was deemed expedient to commence the work and be governed by circumstances in its prosecution.

Accordingly, I immediately took steps to procure the necessary assistants and instruments, and to secure as full data as possible.

Knowing the importance of the work done by the United States Topographical Engineers in sections of the State where it is impracticable for a small party to go with safety, and more particularly the northern portion of the State, I made application, early in May, to General Hitchcock at Benicia, for copies of such maps as had not been published by the Government.

General Hitchcock expressed an interest in the work, and a desire to aid therein by furnishing all the information in his power. But as the regulations of the Topographical Corps made it imperative to have authority from the Bureau at Washington, before such information as was in possession of the Topographical Corps here, could be furnished, it became necessary to apply to Col. J. J. Abert, as Chief of the Corps of Topographical Engineers, for an order to that effect.

On this application being made through your Excellency, the necessary order was promptly issued by Col. Abert, and notice of it forwarded to me through Senator Gwin.

General Hitchcock, upon the arrival of the order to Lieutenant Williamson, afforded every facility for the prosecution of the work, and the archives were opened freely for my examination.

The survey of the Salinas River and of the Tulare Valley, from its head to the San Joaquin, and on both sides of the Lakes by Lieutenant Derby of the Topographical Engineers, and the surveys and explorations made by the corps for the last three years in the north part of the State and in Oregon, collated by Lieutenant Williamson; also a map made by Geo. Gibbs, Esq., who accompanied Col. McKee, the Indian Agent, were used by me in constructing the map.

Having been informed that during the summer of 1851, Capt. Sitgreaves of the United States Topographical Engineers had come through from New

Mexico, striking the Colorado high up, I immediately addressed Col. Abert the following note:—

STATE SURVEYOR GENERAL'S OFFICE

p. 4 Sacramento, June 14, 1852.

Sir:

Having been informed that Major Kendrick of the Army, and Captain Sitgreaves of the Corps of Topographical Engineers, on crossing the country from New Mexico in 1851, struck the Colorado in the vicinity of the 35th parallel, and that Captain Sitgreaves had reported to you the result of his reconnoisance, I take the liberty of applying to you for a copy of the report and map if they have been published; or if they have not as yet been published, and it is compatible with the regulations of the Bureau, I desire to get a copy of so much as relates to the Colorado River.

I have been ordered by the Legislature of this State to collect all the data than can be obtained from various sources, and compile as complete a map of this State as is possible.

You are aware that a portion of the eastern boundary of this State is a diagonal line, running from the intersection of the 120th meridian and the 39th parallel to the Colorado at a point where the 35th parallel crosses it.

The determination of this point is of great importance to this State, and is one of those cases, where owing to a combination of untoward circumstances we are compelled to look to, and await the action of the General Government.

Any information relative to this, or other matters connected with the geography of this State, will be thankfully received and duly acknowledged.

Please direct to me at San Francisco.

Respectfully your obedient servant,

(Signed) WM. M. EDDY.

To Col. J. J. Abert,
Chief of the Bureau of
Topographical Engineers.

In answer to which the following reply was received:

BUREAU OF TOPOGRAPHICAL ENGINEERS
p. 5 Washington, July 17, 1852.

Sir:—

I have received your letter of the 14th June, the report and map of the expedition under Captain Sitgreaves are not yet completed, as soon as these are completed and printed, copies will be sent to you.

I understand from Captain Sitgreaves that he encountered the Colorado north of the 35th parallel, and, as he surveyed the river from that point down, his map will no doubt furnish much information.

Other reports of that country have been printed, as soon as we get copies of them I will see that you are supplied.

Respectfully, Sir,
Your obedient servant,
(Signed) J. J. ABERT,
Col. Corps, Top. Engineers.

WM. M. EDDY, Esq.,

Surveyor General, San Francisco, Cal.

I thus have secured to the State map the result of all the work of the Topographical Engineers in this State for the last four or five years, and the information gained is the more valuable, inasmuch as it covers the most dangerous portions of the State.

Much credit is due to Col. Abert for the promptness with which he responded to the application, and to General Hitchcock and his aid Major Townsend, and likewise to Lieut. Williamson, for the lively interest they have taken in the matter, and the facilities they have afforded.

In the mean time, knowing that the Assistants in the Coast Survey had completed the line of the coast from Initial Point, below San Diego, to Oregon, together with the survey of the islands along the coast and the various bays, I addressed a letter to Prof. A. D. Bache, Superintendent of the Coast Survey, and the following correspondence took place:

STATE SURVEYOR GENERAL'S OFFICE

p. 6 Sacramento, May 28th, 1852.

Sir:—

By an Act of the Legislature of this State, 'to provide for a Map of the State of California,' passed May 4th, 1852, I am directed to include in said map 'all the data which can be obtained from the United States Coast Surveys,' as well as other sources. The information collected under your di-

rections in this State is of vast importance to us, and I trust it may be furnished this office at as early a date as possible. It is desired to include in the said map the work as far as completed, and also such work as may be added during this season. If compatible with the regulations of the Coast Survey, please forward me duplicate copies of such work as has been published, and authority to procure from the Assistants on this coast a copy of such work as may accrue up to the month of November of this year.

An answer at your earliest convenience, directed to me at San Francisco, is respectfully solicited,

Your obedient servant,

(Signed) W. M. EDDY,

Surveyor General.

PROF. A. D. BACHE,

Superintendent Coast Survey,

To which I received an answer through Capt. R. D. Cutts, Assistant on the Coast Survey, as follows:

U. S. SCHOONER BALTIMORE

p. 6 Astoria, O., Sept. 7th, 1852.

Sir:—

I received to-day, from the Superintendent of the U. S. Coast Survey, a copy of a letter addressed by you to him, dated at Sacramento on the 28th May last, requesting to be supplied with all the data collected by the Coast Survey in California, in order that the same may be applied in the construc-

tion of the State Map ordered by an Act of the Legislature, passed May 4th, 1852.

By the regulations of the Department, the Superintendent is authorized to furnish information from the archives of the Survey on condition that the parties receiving it give full credit to the Coast Survey for such information, and also pay for the cost of copying, drawing, etc.

The estimated expense of supplying you with the data required is stated by the Assistant in charge of the office in Washington, to be about $300.

I have been requested by the Superintendent to inform you of the above regulation, and to enquire if the arrangement with respect to the expense would be satisfactory to you.

As I shall not return to California until October, it would materially hasten the matter were you to direct your reply to this note to Prof. A. D. Bache, Washington City.

I am very respectfully, &c.,
(Signed) RICHARD D. CUTTS.

To Wm. M. Eddy, Esq.,
State Surveyor General.

SURVEYOR GENERAL'S OFFICE

p. 7 Vallejo, Sept. 25, 1852.

Sir:

I have just received from R. D. Cutts, Esq., Assistant on the U. S. Coast Survey, a letter dated at Astoria, Oregon, informing me of the regulations

of the Department in reference to information furnished from the archives.

I will conform to the regulations and give 'full credit' upon the face of the map, and will pay the office charges as you may see fit to direct.

Please forward me at once a duplicate copy of all such matter as has been printed, and a copy of that still unpublished, at the earliest possible moment.

I am desirous of completing the map by the 1st of January next, and therefore permit me to solicit the forwarding of the printed matter by the mail of the 5th November, and the other by the mail of the 20th November.

Please direct your communications to me at San Francisco.

Very respectfully,
Your obe't serv't
WM. M. EDDY,
Surveyor General.

To PROF. A. D. BACHE,
Superintendent U. S. Coast Survey.

OFFICE COAST SURVEY
Washington City, Nov. 3, 1852.

Sir:

Yours of the 25th September, addressed to the Superintendent, has been received, and by his direction I hasten to reply, that I this day send by mail, addressed to you at San Francisco, a roll containing

the following published maps to wit: (two copies of each)

p. 8

McArthur's Reconnoisance.
San Diego Bay.
Trinidad Bay.
Point Conception.
Point Pinos.
Mare Island Straits.
San Francisco City.
Monterey Harbor.
Catalina Harbor.
San Pedro Bay.
San Francisco Bay.

The roll will then go by the steamer of November 5th. Tracings of all the unpublished surveys of the Western Coast will be made and forwarded by steamer of November 20th.

Yours, &c.,

(Signed) ISAAC D. STEVENS,
Assistant in charge of office.

WM. M. EDDY, Esq.,
Surveyor General, San Francisco, Cal.

OFFICE COAST SURVEY

p. 8

Washington, Nov. 18, 1852.

Dear Sir:

By directions of the Superintendent, I send to-day, to your address, per Adams & Co.'s Express, a case containing tracings of the unpublished surveys of California by the Coast Survey, and copies of the published maps, (two copies each,) issued since the

date of my last communication, as per inclosed lists. Inclosed I also send a list of geographical positions in California, and table of the latitudes and longitudes of points between San Francisco and San Diego. Should you desire it, descriptions of the stations can be furnished you.

The cost of preparing the tracings is $175, which please remit.

Those which are marked with a cross (X) will go by the steamer on the 25th inst.

Yours, &c.,

ISAAC D. STEVENS,

Assistant in charge of office.

The importance of the information thus derived can be readily understood, when we take into consideration that the whole coast will be as complete upon the map as it is possible to be shown upon such a scale.

I take this opportunity of expressing my thanks to the Department at Washington for their promptness, and to Messrs. Cutts, Alden and Davidson, assistants on this coast, for their courtesy and attention throughout the matter.

That portion of the boundary of the State which lies between the initial point on the Pacific, and the junction of the Colorado with the Gila was
p. 9 furnished me by A. B. Gray, Esq., late United States Surveyor of the Boundary Commission, who kindly allowed me to take a copy of the same, with the adjoining country, from the official map prepared by him for the Department at Washington.

The remainder of the boundaries of the State being astronomical lines, it will be seen that I have met with great success in collecting data enabling me to fix, with precision, the entire boundary lines of California, and I now proceed with a description of the work in the interior, and of my other labors during the season.

In compliance with the 10th section of the 'Act concerning the Office of Surveyor General, Statutes 1850, page 257,' I prepared the following circulars to County Surveyors and County Assessors, which were addressed officially to the respective officers in each county in the State.

SURVEYOR GENERAL OFFICE,

p. 9 Sacramento, June 1, 1852.

Sir:—

I respectfully call your attention to the following extracts from the laws bearing upon the duties of your office in its connection with the Office of the Surveyor General.

1st. From the 'Act concerning the Office of Surveyor General, passed April 17th, 1850.'

Sec. 9. He shall deliver to the Governor, annually, on or before the 15th December, his report which shall contain—

2d. An accurate statement of the progress he may have made in the execution of the surveys enjoined on him by law, and in the preparation of the map of the State.

3d. An estimate of the aggregate quantity of land belonging to the State, and the best information he may be able to obtain as to the characteristics of the same.

4th. An estimate of the aggregate quantity of lands used for, or adapted to tillage and grazing within the State, and each county of the State, together with a description of the locations in which the same may be situated.

5th. An estimate of the aggregate number of horses, cattle, sheep and swine within the State, and each county of the State.

6th. An estimate of the aggregate quantity of wheat, rye, maize, potatoes, grapes, and other agricultural productions of the preceding year.

7th. An estimate of the aggregate quantity of mineral lands within this State, and each county of the State, and the quantity and value of each mineral produced during the preceding year, together with a description of the localities in which said minerals may be found.

Sec. 10. He shall address a circular letter to the County Surveyors and County Assessors, instructing them, and it is hereby made a part of their official duties, to use their utmost diligence in collecting information relative to each and every matter mentioned in the ninth section of this Act, and to transmit to him quarterly, at the Seat of Government, a report in writing, setting forth the result of their inquiries.

Sec. 11. He shall with his annual report transmit to the Governor all reports which he may have

received from his deputies and other persons, as mentioned in the tenth section of this Act.

Your attention as County Surveyor is especially called to the third, fourth and seventh paragraphs of section nine, and it is desired that some especial care shall be taken in collecting the data as required. A sketch of your county, made on any convenient scale, noting all fixed and known points; the range and bearing of mountains and hills; the general course and bearing of all rivers and small streams, with the names thereof; names and locations of all town, villages or settlements, with their distances from each other; is respectfully solicited from you to aid in carrying out the law 'To provide for a Map of the State.'

All geographical or topographical information thus furnished will be duly acknowledged in my Annual Report.

All reports containing the above information must be mailed to this office, (at Vallejo), not later than the first of December, in order that they may be embodied in my annual Report, which I am required to make on or before the fifteenth of December.

2d. From the School Land, or 500,000 acre Land Bill.

'An Act to provide for the disposal of the five hundred thousand acres of land granted to this State by Act of Congress.

Sec. 3. 'The parties purchasing such warrants and their assigns, are hereby authorized in behalf of this State to locate the same upon any vacant and unappropriated lands belonging to the United

States within the State of California subject to such location, but no such location, shall be made unless it be made in conformity to the law of Congress, which law provides that not less than three hundred and twenty acres shall be located in a body.

Sec. 4. 'Lands thus located shall be run off by a line north and south, east, and west, and shall be sufficiently designated by lines and distances, corners or posts, as the case may be, and an entry made thereof in the office of the Clerk of the County Court of the County in which said lands shall be located.'

Sec. 5. 'The location made of lands belonging to the United States as aforesaid, shall secure to the purchaser the right of possession to the land embraced within said survey, until such time as the government survey shall have been made, after which said lines shall be made to conform to the lines of sections, quarter sections, and fractional sections of said government survey; and in the event that two or more persons shall have made a location on the same section, then, and in that event, the person whose location embraces the largest portion of said section, quarter section, or fractional section, shall be first entitled to said location of the same.'

Sec. 6. 'If in the survey to be hereafter made by the General Government, it shall so happen that the improvement made by any person purchasing and locating under this Act shall not comprise the larger part of the first survey, then, and in that case, the party may, if they prefer it, retain that

portion which has upon it their buildings and improvements, although it may be the smaller portion of said section, quarter section, or fractional section: Provided, nothing herein contained shall authorize such location upon any lands heretofore granted by the State, or by the General Government, or on any lands at the time of such survey and location, actually occupied and improved by actual settlers, unless such location be made by the owner of such improvements, not to exceed six hundred and forty acres by any one person: Provided, also, that nothing herein contained shall prejudice the ownership or possession of any lands at the time of said survey and location, held, or claimed under grants from the Mexican or Spanish Government: and Provided, moreover, that at the time of making such location, the first settler or owner of any improvements situated on the tract proposed to be located, shall in all cases have the preference.'

Sec. 7. 'In the event that any location of lands be made under and by the provisions of this Act upon lands supposed to belong to the United States, which should prove to be land not the property of the United States, then, and in that case, the party owning such land warrant or warrants may float the same upon any other public land in the State of California: Provided, the float, and the reasons therefor, be made a matter of record, at the time, in the office where the original location was recorded.'

Sec. 10. 'Lands located under the provisions of this Act shall be surveyed by the County Surveyor, in each county where the location is made, who shall give a certificate setting forth the bounds, and the number of acres contained in such survey, and shall receive for his services such fees as are now or may hereafter be provided by law.'

Sec. 11. 'The clerk of the County Court shall make a record of all certificates of land located under the provisions of this Act, which may have been run off by the proper officer, and shall be entitled to receive from the owner of such location three dollars for such services.'

Sec. 12. 'The County Surveyor of the respective counties of this State, at the end of every three months from the taking effect of this Act, shall make out and forward to the office of the Surveyor General of the State, without fee for the same, a duplicate copy of each plat or survey, and certificate of the location of any land warrant made under the provisions of this Act in their respective counties, and for failure to do so, shall be liable to a fine of not less than five thousand dollars, recoverable before any court of competent jurisdiction on the complaint of any person or persons in interest.'

N. B. All lines run as required above, in section 4, north, south, east and west, must be run by the true meridian, and not magnetic, so as to conform to the lines of the United States land surveys, and the Act takes effect from the 1st day of June inst.

3d. From the law to 'provide for a Map of the State of California.

4

Sec. 3. County Surveyors are hereby required to connect all surveys made by them in their respective counties with, and to some known points to be determined astronomically, or by connection with the United States surveys, whenever practicable, under the direction of the Surveyor General, and report the same to the Surveyor General in accordance with the provisions of the Act 'prescribing the duties of County Surveyors, passed April 9th, 1850.'

Your attention is particularly called to this law, and all returns of surveys under the 500,000 acre land law must be connected as herein provided, and express such connection in plain terms, so that the work can be used in constructing the State Map.

To prevent fraud, endorse on all warrants surveyed by you under the 500,000 acre land bill, the date and number of survey, and for whom surveyed.

Please acknowledge the receipt of this circular at once, and direct to San Francisco.

Respectfully yours,

p. 12 WM. M. EDDY,

Surveyor General.

To ....., County Surveyor.

.....County.

* * * * * * * *

Mare Island.—I would call attention to the fact, that, by an Act passed at the last session de-

p. 16 fining the boundaries of Solano and Sonoma Counties, Mare Island, was left out of both counties, and, at present, is not within the jurisdic-

tion of either, surveys being called for on the Island the past season, I directed the Surveyor of Solano to attend to them."

Senate Document No. 35, also attached as an appendix, is as follows:

"SURVEYOR GENERAL'S OFFICE

Benicia, March 3, 1853.

Sir:—In compliance with the law passed by the last Legislature, 'to provide for a Map of the State', I beg leave to report that the said Map is now compiled, and within a few days will be ready for the engraver.

It will be seen, by reference to the Journals of the last session, that the bill originated in the Senate, and passed that body, appropriating the sum of eight thousand dollars to carry the law into effect. This sum was, in the Assembly, cut down to three thousand dollars.

In my annual report I set forth the amount of work done, and that the sum of three thousand dollars had been totally inadequate to complete the work.

The additional sum of nearly five thousand dollars has been expended by me in compiling the Map. This expenditure was for labor performed and services rendered by other persons than myself, and no charge made for any work done by me.

I respectfully submit, that such expenditures as have been made by me, not covered by the appro-

priations or existing laws, for which I have vouchers, may be audited by the Comptroller.

All of which is respectfully submitted.

WM. M. EDDY,
Surveyor General.

To His Excellency JOHN BIGLER,
Governor of State of California."

State Surveyor General's Report of December 15, 1854, printed as Senate Document No. 5 (Session 1855), attached as an appendix to the annual report of the State Comptroller, contains the following:

Document 5. "MAP OF THE STATE.

p. 5 The official map of California is comparatively worthless in consequence of its great inaccuracy. This fact is established by the almost unanimous testimony of County Surveyors and others, so far as I am in possession of their evidence.

Of the great necessity of having an accurate map I consider it superfluous to speak, and will only refer to some pertinent remarks in the communications of Geo. H. Goddard, Civil Engineer, in appendix F.

For a complete map, a survey of the State boundaries would be necessary, and to accomplish this I would recommend that Congress be requested to make an appropriation.

A survey of County boundaries is also necessary, but this is sufficiently discussed in another part of this report.

Under the head of 'County Roads' I have made some suggestions, which if acted upon, will tend greatly towards furnishing an accurate map.

A competent draftsman should be constantly employed in this office, in compiling from all reliable data now possessed, and what may be hereafter obtained, a map worthy to be stamped 'official.'

I therefore recommend an appropriation for this purpose."

* * * * * * * * *

"CIRCULAR TO COUNTY SURVEYORS"

"THE OFFICIAL MAP OF CALIFORNIA

"I would respectfully request you to com-
p. 27 pare the 'Official Map of the State of California,' a copy of which you will find at the Clerk's office of your County, with the portion of the State with which you are the most familiar, particularly with your own County, and furnish me with the results of your comparison.

Should you find it very inaccurate, an estimate of the expense of making a map of your County, of tolerable accuracy, is desired."

* * * * * * * * *

"As regards the State Map, there is noth-
p. 32 ing right about it, at least so far as my observations have been. Coloma is on the south side of the river, but the map places it on the north. Georgetown bears from Coloma about N.N.E.; the map places it nearly east. Placerville is about S.E. of Coloma; the map places it nearly south. Coon Hollow is between Placerville and Weberville, but

the map places Weberville between the two former. I might thus go on and fill a sheet of paper.

Eddy's observations of the latitude of Placerville places it nearly one mile and a half too far north. Wanting a proper almanac, I have not examined the longitude.

The expense of making a map of tolerable accuracy I think would require near $3000. * * *

WM. HENDERSON,
County Surveyor,
El Dorado County."

* * * * * * * * *

"We have in our office an official map of
p. 46 the State. The County of San Joaquin is somewhat incorrect. The western boundary line should fall due south from the point of starting on the west channel of the San Joaquin River, and should be about twenty miles in length, thence following the Coast Range, nearly south-east, about fourteen miles, thence north-east about ..... miles to the mouth of the Stanislaus River. I am of the opinion that the County is to far north. I believe that the north-east corner of our County is but about fourteen miles north of the 38th dg. of north latitude. I am also of the opinion that the distance from the north-west corner of the County to the San Joaquin River, is much too long. Some of the roads as laid down are not County roads. I can make you a map of this County, on the scale of two and a half miles to the inch, generally quite correct, laying down all of the roads that are truly

County roads, and also others that are traveled, if you wish it, for one hundred dollars. I should be obliged to visit several points on the northern boundary of the County, in order to make up such a map as I should wish to send to you. * * *

GEO. E. DREW,
Deputy County Surveyor of
San Joaquin County."

* * * * * * * * *

p. 56 "I have examined the State Map, and find it about as near a representation as a shirt would be for a night cap! The corner of the county is made within five miles of Sacramento city!—I think it cannot be less than twenty. The Sacramento river is very inaccurately laid down. Suisun bay is improperly represented as the west line of the county. For instance, at Cordelia, the map shows a distance in a northwest direction of fifteen or twenty miles, when it is really not more than seven. * * *

H. P. PATTON,
County Surveyor, Solano Co."

* * * * * * * * *

p. 57 "I have completed a Map of the County of Solano; exhibiting the Government surveys so far as made; the bounds of each of the Spanish grants, designating those confirmed and those rejected; the towns, roads, bridges, mountain and hill lands, tule lands, and other inundated lands, the water courses, county boundary, etc.; a copy of which I will furnish for two hundred dollars. * * *

H. PATTON"

Senate Document No. 17, being report of the Committee on Public lands in relation to a new State Map, submitted March 21, 1855, and also printed as an appendix, reads in part as follows:

"The Committee on Public Lands, to whom p 3 was referred the communication of the Surveyor General, respecting the procurement of sundry official Maps from the United States Surveyor General's office, have had the same under consideration, and beg leave to report as follows:

The need of an accurate and reliable State Map, is felt in almost every legislative measure connected with roads, railroads, county boundaries, and the disposal of the public lands. That no such map has been yet published in this State, is too well known. It is needless, however, for the Committee here to recapitulate the history of the present 'Official' State Map, or to point out its errors and deficiencies. Since the compilation of that map, a much larger amount of authentic materials has been collected, at great expense to the United States, by the different surveying corps, under several departments of the General Government. The County Surveyors have also gathered abundant items of information by their numerous private surveys; and the railroad surveys and various ditch surveys in the mines have also contributed their share to the common stock.

In what mode the State shall possess itself of this kind of information, and combine it all into an accurate general map o tate, in manuscript, and

not in print, is what the Committee propose briefly to consider."

Report of the State Surveyor General dated January 7, 1856, printed as Assembly Document No. 5 (Session of 1856), as an appendix to the Annual Report of the State Comptroller, contains the following item:

"I have had occasion previously to remark, p. 45 that the official map of California is comparatively worthless, in consequence of its great inaccuracy, and to recommend certain measures by which a better one might be obtained. To discuss the necessity of having an accurate map of the State, would be to insult the understanding of every intelligent man. I have therefore considered it a self-evident proposition. Under the head of 'County Roads,' and of 'County Boundaries,' may be found some suggestions concerning a State Map.

I would repeat the recommendation, that Railroad and Wagon Road Companies be required to send to this office maps of their respective roads, made on such scale as the Surveyor-General may designate, which shall exhibit accurately the topography of the adjoining country. For some valuable remarks upon a State Map, I would respectfully refer to the Report of Hon. Sherman Day, Chairman of the Senate Committee on Public Lands, of the last session, Doc. No. 17, App. to Senate Journal. I would also refer to remarks upon the same subject by Chas. H. Poole, County Surveyor of San Diego County, in his valuable Report of this year, which may be found in Appendix D."

* * * * * * * *

The report of Chas. H. Poole, County Surveyor of San Diego County above referred to and attached as an appendix to the Annual Report of the State Comptroller contains the following item:

"I have no hesitation in saying that
p. 237-8 the map of the State of California, approved and declared to be official by Act of the Legislature, whatever may be its reputation for accuracy in the northern counties, is most lame and impotent in its delineations of the topography of this part of the State. Places are given upon the map that are new to our eldest residents, and fabulous localities are bestowed upon us gratis, and furnished 'officially' with a local habitation and a name. Roads are laid down thereupon, over districts which never have been, and in all human probability never will be, trod by mortal man, and old and well-known points are either stricken out of existence, or baptized with new and unheard of appellations. The number of rivers in the county is not far from correct, but their locations and courses do violence to all notions of topographical propriety. The faint shadowings of mountains over some portions of the district, hardly gives us a complete idea of their extensive proportions, nor does the vast and important region known as the desert, seem to have been considered worthy of even a name. The road to Fort Yuma is very conveniently located on the map, being a great improvement over the one upon the ground, and the numerous wells placed adjacent thereto by our ingenious geographers, must afford a grateful solace

to the thankful and thirsty traveler, should he ever succeed in finding them.

Plainly and seriously, this map as far as it relates to this section of the State, is a sham and an imposture, altogether as disgraceful to the authority which indorsed it, as to its makers or compilers. A crude and ill-digested performance like this, conducted with parsimony and executed in haste, cannot fail to bring reproach upon the profession, as it has already wronged the public who authorized its publication.

A map worthy of California, and entitled to respect as competent authority, never could have been constructed in the short space of time allotted to the one under consideration, even with a large and able corps of surveyors, observers and assistants, and liberal financial aid from the State—none of which advantages I suppose that enterprise to have enjoyed.

No reliable map of the State can be produced, I think, unless liberal appropriations are made to carry on the undertaking, in order that the services of skillful and experienced practitioners can be secured for a term of years, the longer the better, so as to determine with the utmost accuracy, by astronomical and trigonometrical measurement, the exact position of every important point. The only system by which this can be accomplished, is that of covering the entire area with a net-work of triangles, and this we know is a work of patient and extended labor, and by no means a matter of speedy accomplishment.

Those States and foreign countries which have hitherto engaged in such surveys, have acted in accordance with similar views, and few of their surveys are yet completed, their publications being generally confined to detached and important localities. The 'ordnance survey' of England and Ireland is still in active prosecution, and although it has been forty years in progress, it is not yet complete as a whole. The survey of France, commenced some sixty years since, has not been published, nor is our national coast-survey much more than commenced, though it has been conducted with energy and expedition, with every assistance the Government could furnish, for twenty-three years. The State surveys of New York, Massachusetts, and several other states, were from eight to fifteen years in progress, under exceedingly liberal auspices, before any results were published, and these were even declared unsatisfactory by their compilers, owing to the brief time allowed for their completion.

With the plain history of similar undertakings before us, and the light of their experience as a guide, it would be unwise for us to expect the production of a correct and finished map, before time and means had been provided to perfect a thorough and minute survey. The Publication of a worthless, because inaccurate map, works harm in more ways than one, and not the least is the discredit it throws upon a profession claiming some hard-working and deserving members.

Private enterprise can furnish all the crude and cheap maps that are wanted for ornament and show, and are demanded by those for whom such things are sufficient, but an enlightened community, and an age of intelligence requires a high degree of perfection in a public work like this, susceptible in all its details, of the most rigid demonstrative accuracy.

I have the honor to be with high respect,

Your most obedient servant,

CHARLES H. POOLE,

Surveyor San Diego County."

The Annual Report of the State Surveyor General dated January 12, 1857, and printed as an appendix to the Senate Journal (8th session), contains the following item:

VI. STATE MAP.

"The existing official map of the State is
p. 23-4 a broad burlesque upon the topography of California. No mortal foot has ever trodden over roads delineated upon it, and the directions of mountain chains and river courses, as there laid down, are most admirably calculated to answer the purpose of an ignis-fatuus to delude the benighted traveler, who should ever trust to their guidance. Lakes are placed where the thirsty soil rarely sucks a drop of water, and fertile plains appear where only barren deserts stretch their broad expanse. It is a disgrace and a reproach to the State and should be replaced at once by a map conforming to

the true character of the country. By private means a mass of valuable geographical information has been collected, and from the various sources of which it is easy for the State to avail herself, a map, correct in detail, with a true delineation of county lines, river courses, mountain ranges, roads, mining canals, positions of towns, &c., can be collated at a comparatively small expense. Such a map made in the original, upon a scale admitting of additions, as from time to time increased geographical knowledge will render necessary, should be on file in the Surveyor General's Office, from which, if ever deemed necessary, publications could be made. An official map is supposed to be final evidence of county boundaries, and other geographical and topographical truths by which the State or county interests can be affected—in the determination of election contests, for example, where the returns from a single princt (as has been the case) may decide for or against the right to his seat of a Senator or an Assemblyman. The State should possess a correct map in the original, and not be at the mercy of any unauthorized publication. But such an undertaking, if begun, should be upon a scale of expenditure and performance worthy of the State and the value of the work. From time to time, subsequent Legislatures can appropriate sums for the prosecution of the labor on the map to its completion. In New York, Massachusetts, Pennsylvania, and other States, years of labor have been bestowed upon similar works, and it behooves Cali-

fornia, who has a greater immediate interest in the development of truthful and reliable information concerning the topography of her territory, to take prompt and effective measures to secure the commencement of a correct State map. I would recommend the appropriation of $5,000 for that purpose."

Annual Report of the State Surveyor General dated January 7, 1858, printed as an appendix to Senate Journal (9th session), contains the following item:

STATE MAP.

"The remarks on this subject, in my last p. 16 annual report, are of the same force now as they were then. The need of a correct map is even greater now than then. The so-called official map of California, by Eddy, is still acknowledged. No other state has enjoyed equal advantages with California, for improvement in this respect, and in no other state would a correct knowledge of the topography of the country be of such public utility. We are far behind the rest of the Union in these matters, and I urgently request that so important a subject may meet the notice it deserves."

Mr. PECKHAM: Government rests. [310]

DEFENDANTS' EVIDENCE.

Mr. KELBY: If your Honor please, the motions that we are about to present are those which are addressed to the Bill of the plaintiff, and which are made pursuant to the defendant's reserved objec-

tions. The first one is a motion to strike, and if it please the Court, as I direct it to a particular allegation of the complaint, will the Court rule on the matters one by one?

The COURT: Have you a written motion similar to the one you are now reading?

Mr. KELBY: No, I have not.

The COURT: Are you prepared to offer evidence in this case?

Mr. KELBY: Yes, your Honor.

The COURT: Why not file your objections in writing, and let the Court reserve its decision and proceed with the introduction of your evidence?

Mr. KELBY: I am perfectly willing to take the ruling of the Court.

The COURT: Don't you think that would expedite the matter?

Mr. KELBY: I am willing to co-operate to the fullest extent, because I am a time-saver, myself.

The defendants offer in evidence Defendant's Exhibit 13, which is a plat of township No. 3 north, range 4 west, Mount Diablo Base Meridian, it being a photostatic copy of a map certified by John Plover, the United States Surveyor General for California, and which is a map referred to in the answer.

Mr. PECKHAM: To which we object, if your Honor please, on the ground that it does not appear that that is an approved and accepted township plat of the land that it purports to describe. It is a de facto survey, and is without proof that it is an

approved and accepted plat. We will object to its admission.

The COURT: What plat was that?

Mr. KELBY: That was the plat that was made and approved, I [311] think, on March 4, 1863.

The COURT. Objection overruled; an exception.

Mr. PECKHAM: May I point out to the Court that that is not the map of 1863, but is a Joy survey made in 1923. We object to it further that it does not appear to be complete, that there are cuttings-out that I think this Court and we are entitled to see. We object to it because it appears on its face to be defaced, and appears to have eliminated from it portions of the map which may or may not be relevant to the inquiry here.

The COURT: Cannot we obtain a copy that has not been cut in any way, Mr. Kelby?

Mr. KELBY: This map is, as I find it, your Honor.

The COURT: This was a portion of the Joy map that was eliminated is that right?

Mr. PECKHAM: That is it, it was eliminated by the Commissioner of the General Land Office.

The COURT: I wish, Mr. Kelby, if objection is made that this exhibit has been mutilated, that you present a copy *of the* of the plat that has not been mutilated or cut in any way.

Mr. KELBY: All I can say is that it has not been mutilated by me.

The COURT: I should like to have a copy of that plat before me.

Mr. KELBY: Yes, I will see if I have one anywhere else.

The COURT: Very well.

Mr. PECKHAM: For the record, may I interpose the further objection to the last exhibit that it is a purported sectionizing survey by the General Land Office of land within the limits of land reserved by the President from entry, and committed to the Navy Department, and over which the Land Office had no power to make a survey. Your Honor's ruling will be the same?

The COURT: You are offering it now? [312]

Mr. KELBY: Now I offer the same map.

The COURT: You stated that that map was made in 1863. You mean in 1923?

Mr. KELBY: This is certified as of October 24, 1923, and purports to be a survey by Francis E. Joy, United States Cadastral Engineer, and dated apparently January 27, 1921, and refers to a supplemental map of September 27, 1923, so I think that I shall have to eliminate what I said in respect to its having been a map or plat approved in 1863, and amend that by stating that it is a map of a survey completed October 10, 1923.

The Court: The objections are overruled and an exception. It may be admitted.

(The map is marked "Defendant's Exhibit 13.")

Mr. KELBY: Defendants offer in evidence a map of Township No. 3 north, range 4 west, M. D. M., approved March 4, 1863, by the United States Surveyor General of California.

Mr. PECKHAM: If your Honor please, for the benefit of the record, may we make the objection to this map, that as to Township 3 north, range 4 west, the map is original only of surveyed lines and the United States Surveyor General has, at a previous hearing of this case, testified that the lines as shown on Mare Island on the west side of Mare Island Straits were not survey lines, they are mere sketched lines.

The COURT: Overruled, an exception.

(The document was received in evidence as "Defendants' Exhibit 141".)

Mr. KELBY: We offer in evidence plat of township 4 north, range 4 west, Mount Diablo Meridian, which appears to be certified as of March 4, 1863.

Mr. PECKHAM: If your Honor please, to this map we object, it does not appear that the land embraced within the confines of this map is any part of Swamp and Overflow Lands 34, or any part of the [313] land covered by the patent sought to be cancelled in this proceeding.

The COURT: What do you say to that?

Mr. KELBY: I say, your Honor, that we shall require this map for purposes that we have thus far not alluded to, and that is that these two bodies of land were one, Island No. 1.

The COURT: Overruled; an exception.

Mr. PECKHAM: May we add to that objection that this purports to be a survey by the Land Office of lands within the confines of a military reservation committed to another department of the Government, to-wit: the Navy Department?

The COURT: Objection overruled; an exception.

(The map was marked "Defendant's Exhibit 15".)

Mr. KELBY: Yes.

Mr. PECKHAM: Objected to as immaterial, irrelevant, and incompetent. Generally this covers lands not within the confines of the patent that we are seeking to cancel, except it purports to patent land within the confines of a Government Reservation, and beyond the power of the Land Office.

The COURT: Overruled; an exception.

(The document was marked "Defendant's Exhibit 16".)

Mr. KELBY: Defendants offer in evidence a certified copy of an excerpt from the History of Solano and Napa Counties, California.

Mr. PECKHAM: May we interpose the objection to that that in so far as it seeks to affect the title to this property, or the issues in controversy in this case, it is immaterial, irrelevant, and incompetent?

The COURT: I suppose it is offered for the same purpose you offered portions of the history.

Mr. PECKHAM: It is from the same book, but I offered it to show the life of Sawyer from a frontispiece signed by Sawyer.

The COURT: Overruled; an exception. [314]

(The document was marged "Defendant's Exhibit 17".)

Mr. KELBY: Defendants offer in evidence a certified copy of the stipulation in the case of Bouldin, et al., v. Phelps, et al., for the purpose

of showing, if your Honor please, that the United States of America was represented in that cause by A. L. Rhodes, Special Counsel for the United States, who signed the stipulation.

Mr. PECKHAM: If your Honor please, we will have to object to that as immaterial, irrelevant, and incompetent. I will say this, I will stipulate to the fact that Judge Rhodes represented the Government in that case; of course he did, the records show it.

Mr. KELBY: I will take Counsel's stipulation, your Honor.

(The document is marked "Defendant's Exhibit 18".)

Defendants offer in evidence a certified copy of pages 315, 316, 317, and 318, California Field Notes, Volume 396, of which this is alleged to be a true exemplification.

Mr. PECKHAM: If your Honor please, we object to that on the ground that in so far as it purports to be field notes of a survey of Swamp and Overflow Land 34, it is an attempt by the Land Office to survey land in the exclusive possession, custody, and control of the Navy Department under presidential reservation, and the Land Office's authority was terminated.

The COURT: Overruled; an exception.

Mr. PECKHAM: On the further ground it is immaterial, irrelevant, and incompetent.

The COURT: The same ruling.

(The document was marked "Defendant's Exhibit 19".)

Mr. KELBY: Defendant's offer in evidence a list, No. 208, being a list of Swamp and Overflow land selected as inuring to the State of California under the provisions of the Acts of Congress approved September 28, 1850, and July 23, 1866, in the district lands subject to sale in San Francisco, embracing 13,817.44 acres, which list is duly certified by W. S. Kingsbury, Chief of the Division [315] and ex-officio Register of State Lands.

Mr. PECKHAM: We make objections as immaterial, irrelevant, and incompetent.

The COURT: Overruled; an exception.

(The document was marked "Defendant's Exhibit 20".)

Mr. KELBY: We offer in evidence a duly certified copy of Patent No. 214 and No. 937,055 Swamp Land in the San Francisco District, California.

Mr. PECKHAM: If your Honor please, we object to this as immaterial, irrelevant, and incompetent to the extent that it attempts to vary—and may the record show that this objection is also made to the last preceding exhibit, it is an attempt to vary the Patent that we have introduced, made to the State of California by the Government, covering the very land, Swamp and Overflow 34; we further object to this and the preceding document that the Darlington Survey could not be modified in any such manner as this.

The COURT: Overruled; an exception.

(The document was marked "Defendant's Exhibit 21".)

Mr. KELBY: We offer in evidence a copy of that portion of page 64 of Swamp and Overflow Lands Register pertaining to Swamp and Overflowed Lands Survey No. 569, Solano County, California, duly certified by W. S. Kingsbury, Chief of the Division, and ex-officio Register of State Lands.

Mr. PECKHAM: To which we object as immaterial, irrelevant, and incompetent, and an attempt to vary the Darlington Patent issued by the State of California, and a survey made by Wade-Hemicourt in support of the Darlington patent, and that it is immaterial, irrelevant, and incompetent, the patent speaks for itself.

The COURT: Overruled; an exception.

(The document was marked "Defendant's Exhibit 22".)

Mr. KELBY: We offer in evidence a copy duly certified of the record of patent issued April 7, 1874, to John W. Pearson, for lands [316] described in Swamp and Overflowed Lands Survey 569, Solano County.

Mr. PECKHAM: To which we object on the ground that 569 has nothing to do with this suit, it is a suit to cancel a patent on Swamp and Overflow 34.

The COURT: Overruled; an exception.

Mr. PECKHAM: On the further ground that nothing that the State of California can do can affect the interest of the United States in any manner.

The COURT: The same ruling; an exception.

(The document was marked "Defendant's Exhibit 23".)

Mr. KELBY: Defendants offer in evidence a duly certified copy of communications between the State of California and the Interior Department of the United States, pertaining to townships 3 and 4 North, which are dated October 18, 1912, February 12, 1913, November 12, 1914, July 29, 1912, November 17, 1914, December 4, 1914, April 17, 1915, April 22, 1915, March 6, 1923, March 22, 1923.

Mr. PECKHAM: If your Honor please, for the purpose of the record may we object to the introduction on the ground that they are immaterial, irrelevant, and incompetent, purporting to be communications with respect to a proceeding in the Land Office to effect the determination of Swamp and Overflowed Lands, and, as far as the Land Office is concerned, that these proceedings have all been merged in the issuance of the patent?

The COURT: Overruled; an exception.

(The document was marked "Defendant's Exhibit 24".)

Mr. KELBY. Defendants offer in evidence a list of Swamp and Overflowed Lands in California, being list 838, certified by Louis W. Reilly, Examiner, and approved by G. B. Driesbock, Chief of Division G, and by the Commissioner of the Land Office, with the determination of the Commissioner of the General Land Office thereon, and approval of the First Assistant Secretary, dated January 30

and March 12, 1924, relating to patent No. 937,055, April 26, 1924. [317]

Mr. PECKHAM. For the record, we object to that on the ground it is immaterial, irrelevant, and incompetent, that the lands therein purported to be listed to the State were public lands of the United States, but were within the confines of a military reservation covered by a Spanish Grant at the time of the Swamp and Overflowed Act to which the decision purports to refer, and that the Land Office had no authority whatsoever to make the decision.

The COURT. Overruled; an exception.

(The document was marked "Defendant's Exhibit 25".)

Mr. KELBY. We offer in evidence a map, a photostat, of Township 3 North, Range 4 West, Mount Diablo Meridian, certified by E. F. Beale, United States Surveyor General, and also bearing the certificate under date of July 24, 1907, of Mr. Fred Dennett, Acting Recorder of the General Land Office, to the effect that this is a copy of the plat of official survey of the lands to which it relates, on file in this office.

Mr. PECKHAM. We will have to object, I can appreciate Counsel's position, but that precise exhibit was the one to which Surveyor General Barker testified at the previous hearing in this case, and he pointed out that that line of Mare Island, as shown on that map, was a mere sketch and not a surveyed line, and with that comment I have no objection to the map going in.

(Defendant's Exhibit 12 for identification is marked in evidence as "Defendant's Exhibit 12".)

Mr. KELBY. We offer in evidence map of township 4 north, range 5 west, Mount Diablo Meridian, California, exclusive of the writing found on the back of this exhibit.

Mr. PECKHAM. With the understanding that it is offered exclusive of the writing on the back, I have only the objection for the record that it is immaterial, irrelevant, and incompetent.

The COURT: Overruled; an exception.

(The document was marked "Defendant's Exhibit 26".) [318]

Mr. KELBY. Defendants offer in evidence a map, a sketch, and field notes of survey relating to the Darlington Survey, so-called, and purporting to have been made by the County Surveyor of Solano County, on the 10th of October, 1866, David P. Wade, County Surveyor.

Mr. PECKHAM. We make the same objection to that as immaterial, irrelevant, and incompetent.

The COURT. Overruled; an exception.

(The document was marked "Defendant's Exhibit 27".)

Mr. KELBY. We offer in evidence a map of Mare Island Straits, California, from a trigonometrical survey under the direction of Adbache, Superintendent of the Survey of the Coast of the United States, triangulation by R. D. Cutts, Assistant, topography by R. D. Cutts, Assistant, and A. F. Rodgers, Sub-Assistant, hydrography by the party under the command of Commander James Alden,

U. S. N., Assistant, exclusive of the writing found on the back of it.

Mr. PECKHAM. Exclusive of the writing found on the back we have no objection to its going in. We have already introduced it as one of our Government's Exhibits.

(The document was marked "Defendant's Exhibit 28".)

Mr. KELBY. We offer in evidence a chart entitled "California, Mare Island Quadrangle, Department of the Interior, U. S. Geological Survey, Edition of 1916, Reprinted 1927, Polyconic Projection, North American Datum.

Mr. PECKHAM. To this, if your Honor please, we have no objection to show the configuration of the coast, but we do object to the applied name upon it, Island No. 1, as no part of the duty of the Geological Survey, and because it appears to have been first made in 1916, after the reclamation of the portion of Mare Island labeled here as Island No. 1.

The COURT. Overruled; an exception.

(The document was marked "Defendant's Exhibit 29".)

Mr. KELBY. With respect to these motions which you original- [319] ly permitted me to file, shall I file those in the Clerk's Office?

The COURT: Yes.

Mr. PECKHAM. If your Honor please, counsel requested records from Mare Island on dredging and filling. I have data which will show the amount of the fill put in prior to 1906. It measured 49,000 yards of material.

Mr. KELBY. That is up to 1906?

Mr. PECKHAM. Yes. Since that time I think Captain Carlson illustrated on this map, here, up to 1906 this had been filled and some 49,000 yards of material put on it. Up to 1917 this line YY was filled, and in 1931 the line XX was filled on this big chart. The quantities, yardage and depth have never been kept because it was simply a by-product of the dredging of the channel.

Mr. KELBY. I am now going to ask Counsel to stipulate that whatever interest David N. Darlington had in the land covered by the California patent to him dated March 18, 1857, has passed by mesne conveyance to the defendants herein, and that the defendants hold such interest as tenants-in-common in the undivided proportions as follows:

Edmund Burke, 3/100, James E. O'Donnell, 30/100, Walter E. Burke, as Trustee for Villa M. Behan, 27/100, Fletcher M. Slosson, Frances Morse, and Ellinor Caroline Whitman, jointly, 40/100.

Mr. PECKHAM. So stipulated.

Mr. KELBY. There are other objections as to the introduction of evidence at the last trial, last session; shall I also make that the subject of a written motion?

The COURT. If you will.

Thereupon the case was submitted on briefs to be filed 40, 30, and 20. [320]

[Title of Court and Cause.]

STIPULATION.

It is hereby stipulated and agreed that the foregoing statement of evidence is a correct copy of the condensed trial record with the testimony stated in narrative form.

Dated: May 7th, 1934.

H. H. McPIKE,
United States Attorney,
By ESTHER B. PHILLIPS,
Assistant U. S. Attorney.
Attorney for Complainant.

JAMES E. KELBY,
GORDON LAWSON and,
SAMUEL M. GARROWAY,
By JAMES E. KELBY,
Attorneys for Defendants.

The foregoing statement of evidence, consisting of 141 pages, is hereby approved.

Dated: May 7, 1934.

THE COURT,
By A. F. ST. SURE,
Judge.

[Endorsed]: Filed May 7, 1934. [321]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the above named plaintiff and to its attorneys:

The above named defendants, conceiving themselves aggrieved by the final decree entered herein

on or about the 17th day of January, 1934, in favor of plaintiff and against these defendants, hereby respectfully appeal from the said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and pray that a citation be issued as provided by law to the above named plaintiff, commanding it to appear before said Circuit Court of Appeals to do and receive what may appertain to justice to be done in the premises; that a transcript of the pleadings, proceedings, testimony, exhibits, and orders, filed in this cause on which said decree was entered, duly authenticated by the clerk of the Court, be submitted to the United States Circuit Court of Appeals for the Ninth Circuit under the rules in such cases made and provided. [322]

Dated: Los Angeles, California, this ..... day of April, 1934.

James E. O'Donnell, Juanita O'Donnell, his wife, Fletcher M. Slosson, Dorothy Slosson, his wife, Frank Clifford Morse, Frances Morse, his wife, Eleanor Caroline Whitman, formerly Eleanor Caroline French, Alfred Whitman, her husband, Villa M. Behan, formerly Villa M. Burke, substituted in the place and stead of Walter E. Burke, as administrator of the Estate of Edmund Burke, deceased, Villa M. Behan, formerly Villa M. Burke, substituted in her own proper

person in the place and stead of Walter E. Burke, as trustee for Villa M. Behan, formerly Villa M. Burke,

By JAMES E. KELBY
GORDON LAWSON
SAMUEL M. GARROWAY
Solicitors for said Defendants.

[Endorsed]: Service of the within Notice of Appeal by copy admitted this 10th day of April 1934.

H. H. McPIKE
Attorney for.....

Filed Apr. 10, 1934. [323]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Come now the defendants, James E. O'Donnell, Juanita O'Donnell, his wife, Fletcher M. Slosson, Dorothy Slosson, his wife, Frank Clifford Morse, Frances Morse, his wife, Eleanor Caroline Whitman, formerly Eleanor Caroline French, Alfred Whitman, her husband, Villa M. Behan, formerly Villa M. Burke, substituted in the place and stead of Walter E. Burke, as Administrator of the Estate of Edmund Burke, deceased, Villa M. Behan, formerly Villa M. Burke, substituted in her own proper person in the place and stead of Walter E. Burke, as Trustee for Villa M. Behan, formerly Villa M. Burke, and make the following assignment of errors

upon which they will rely upon their prosecution in the above entitled cause of an appeal from the final decree made by this Honorable Court and entered herein on or about January 17, 1934:

(Note: Hereinafter when reference is made to "the property," it will refer to that portion of the property described in plaintiff's complaint as certain swamp and overflow land, Survey No. 34, containing 164.55 acres, and designated as a fractional portion of the south one-half of the southeast quarter of Section 10, the northeast fractional portion of the northeast quarter of Section 15, the southwest fractional portion of the northwest quarter of Section 14, and the northeast fractional portion of the southwest quarter of Section 14, Township 3 North, Range 4 West, M. D. B. & M.) [324]

I.

The Court erred in holding that complainant, UNITED STATES OF AMERICA, is the owner of and since the year 1853 has occupied as part of the Mare Island Navy Yard reservation for public, to-wit: military and naval purposes, and has been in possession of "the property".

II.

The Court erred in holding that the subdivisional descriptions, designated as "the property", are null and void and that no such tracts or parcels or pieces of land exist, or are delineated, or shown upon any approved and accepted United States public land survey, may, or plat.

III.

The Court erred in holding that a grant of Mare Island, including and embracing "the property", was duly made by the Government of Mexico to one Victor Castro by an instrument dated May 20, 1841, executed by Juan B. Alvarado, Constitutional Governor of the Department of California; that a decree was duly given, made, and entered by the Board of Land Commissioners, confirming to the petitioners, George W. P. Bissell and William H. Aspinwall, their right and title in and to "the property".

IV.

The Court erred in holding that the Board of Land Commissioners was vested with power and authority to make such confirmation by the Act of Congress, approved March 3, 1851, (9 stat. 631) and that the claims of the petitioners, Bissell and Aspinwall, to "the property" were under right and title derived from the Mexican Government.

V.

The Court erred in holding that the District Court of the United States, for the District of California, duly gave and made its order for judgment in said cause, confirming the grant and the decision of the Board of Land Commissioners; and in finding that [325] the said District Court duly gave and made its judgment and decree confirming said decree of said Land Board, and directing the entry of said decree nunc pro tunc as of the 2d day of March, 1857.

VI.

The Court erred in holding that the defendants, hereinabove named, are remote claimants under, successors to, and in privity with the United States, in respect to the claim to "the property", filed with and alleged to be confirmed by said Land Board.

VII.

The Court erred in holding that the survey of "the property", made by the Surveyor General of California in July 1877, was thereafter approved by the Commissioner of the General Land Office and that he caused the same to be filed in a jacket called "The Mare Island Jacket", in the file of the Military Reservations in the General Land Office; and that on September 22, 1905, the Commissioner of the General Land Office expressly approved, used, and acted on said survey; and on September 28, 1905, the Secretary of the Interior expressly approved and concurred in the action of the Commissioner of the General Land Office and approved, used, and acted on said survey and plat.

VIII.

The Court erred in holding that on February 9, 1853, the Secretary of the Navy of the United States, acting under and in pursuance of Section 3 of the Act of August 31, 1852 (10 Stats. 104), duly selected the property as a site for a Navy Yard and Naval Depot, provided for by said Act of Congress, and that, following said selection, the Secretary of the Navy, on February 9, 1853, recommended to the President of the United States that the property

be reserved for public use and that on February 11, 1853, President Millard Fillmore duly approved said recommendation and made a reservation covering "the property"; and that said reservation was communicated to the Secretary of the Interior and properly recorded, and [326] that from time to time the Congress of the United States duly approved, ratified, and confirmed said reservation covering "the property", and by various statutes appropriated large sums to improve "the property" and authorized its improvement.

IX.

The Court erred in holding that "the property" is a part of the lands and premises described and conveyed by the grant of Juan B. Alvarado, Governor of California, under the rule and occupancy of Mexico, to Victor Castro, confirmation of which grant was made by the Board of Land Commissioners and by the United States District Court; and that the property included in the description of the lands described in Paragraph II of the Bill of Complaint are a part of the lands and premises purchased by the United States from said Bissell and Aspinwall and their co-grantor, Mary S. McArthur.

X.

The Court erred in holding that ever since February 16, 1853, the United States has occupied "the property" by and through its Navy Department and officials, and has used and improved the same for military purposes in connection with the Naval

Station, Navy Yard, and premises of complainant situated thereon, and that the possession of the United States of "the property" has at all times been actual, open, adverse, and exclusive and under claim of right and absolute ownership in fee of "the property", and under the title and color and claim of title supplied by said reservations and the deed of January 4, 1853, and the decision of the Board of Land Commissioners of May 8, 1853, and the order of the District Court of the United States, for the District of California, duly given and made March 2, 1857, and the decree of April 15, 1930.

XI.

The Court erred in holding that the claim or claims of these defendants in and to the property is wholly without right or foundation in law or in fact, and that the nature of these defendants' [327] claims appearing in their answers are wholly without right.

XII.

The Court erred in holding that the patent dated March 9, 1928, to the State of California of "the property" is null and void and is without force and effect and has no validity, for the reason that the lands described in said patent were claimed and held in private ownership from the Government of Mexico at the time of the passage and approval of the Act on September 28, 1850 (9 Stats. 519), commonly known as the "Swamp Land Act", and was not a part, and never had been a part, of the public domain of the United States, or been opened

by entry to private persons or subject to the aforesaid Swamp Land Grant, but had, at all times since the date of the Mexican Grant to Victor Castro, been owned and occupied by complainant, as predecessor, and by those under whom the complainant claims its proprietary ownership thereof; and for the further reason that the property had been selected for and devoted to the necessary public purposes of the United States and withdrawn from entry by private persons, as alleged in Paragraphs VI and VII of plaintiff's Bill of Complaint, long prior to the issuance of the patent to the State of California, and while the legal title in and to said lands was vested in the United States of America, and for the further reason that said patent was not issued pursuant to the judgment, discretion, determination, or power of said Hubert Work, as Secretary of the Interior, or of the Commissioner of the General Land Office, or upon or pursuant to any finding or conclusion or judgment of said officials, or either of them, or of the President of the United States, which said officials are by law charged with the responsibility of caring for, protecting, disposing of, and awarding patents for or other evidences of title to the public domain and any part thereof; and for the further reason that the descriptions of the patent are null and void and designate no tracts or parcels of land shown or delin- [328] eated on any approved and accepted map or plat.

XIII.

The Court erred in holding that the only final, recognized, approved and accepted United States

public land map, or plat of that portion of Mare Island contained within fractional Township 3 North, Range 4 West, M. D. B. & M., and showing tracts and parcels of land therein and controlling all descriptions of land and lots and tracts therein for disposal and other governmental purposes, is the map and township plat approved and accepted in 1923, a true reproduction of which is attached to plaintiff's Bill of Complaint and marked "Exhibit J".

XIV.

The Court erred in holding that complainant is without adequate remedy in the premises at law.

XV.

The Court erred in holding that it is not true that these defendants, or either or any of them, are the owners of or entitled to the possession, as tenants in common, or otherwise, as alleged in the joint answers of the above named defendants to the complaint as amended, of "the property".

XVI.

The Court erred in holding that it is untrue that the grant of Mare Island, by Juan B. Alvarado to Victor Castro, dated May 20, 1841, is void on its face, because it purports to grant an interdicted island, or that said grant was or is a forgery, or that plaintiff knew that it was such when plaintiff's Bill of Complaint was filed; and in holding that it is not true that the decree of confirmation by the United States Land Commission is void on its face.

XVII.

The Court erred in holding that it is untrue that the proceeding to confirm the said grant of Mare Island to said Castro and his mesne successors had terminated on June 4, 1853, by their conveyance of said premises to plaintiff or plaintiff's acceptance of the same; and in holding that it is untrue that said grant did not include any portion of [329] the premises sought to be described, delineated and depicted in State Segregation Surveys Nos. 34 or 569, or either of them, or any land north of a line drawn from Station 54 to Station 138, as depicted in Freeman's Survey of 1877.

XVIII.

The Court erred in holding that it is not true that the appeal of the United States from the decree of confirmation was, or that any of the proceedings had therein were, null or void on their face, or otherwise.

XIX.

The Court erred in holding that it is not true that the nunc pro tunc decree of confirmation, entered in the above entitled Court in said proceedings, is null and void on its face, or otherwise.

XX.

The Court erred in holding that it is not true that the conveyance of Bissell, Aspinwall and McArthur to the United States, dated June 4, 1853, is null or void on its face, or otherwise.

XXI.

The Court erred in holding that it is not true that the order of the President, dated November 6, 1850, reserving Mare Island for public use, is null or void on its face, or otherwise.

XXII.

The Court erred in holding that it is not true that the order of the President, dated February 9, 1853, reserving Mare Island with all of its appendages of tule or marsh, ordinarily reported to belong to Mare Island, is null or void on its face, or otherwise.

XXIII.

The Court erred in holding that it is not true that the premises described in Paragraph II of plaintiff's complaint are a part of any Island No. 1, embraced in said Survey No. 34 or No. 569, as depicted on the official maps of plaintiff, copies of which, marked, respectively, "A" and "B", are attached to the joint answers [330] of defendants, filed March 31, 1931, and therein referred to and incorporated, or as reported or depicted in any approved survey and plat of Township 4 North, Range 4 West, M. D. B. & M., accepted November 8, 1923, were on September 28, 1850, or at any time, or at all, ever a part of the public domain of the United States, or swamp or overflowed lands embraced in Swamp and Overflowed Land Grant to California at that time.

XXIV.

The Court erred in holding that it is not true that "the property" is not within the exterior boundaries of Mare Island and is north of the northern boundary of Mare Island, as established officially by United States Surveyor General Wagner, or anyone within his jurisdiction to so establish, and in holding that "Exhibit M" attached to and made a part of the joint answers of these defendants, March 31, 1931, was neither a decision nor within the jurisdiction of United States Surveyor General Wagner and that Surveyor General Wagner had no power to alter or modify said Survey of Freeman.

XXV.

The Court erred in holding that it is not true that the improvements made by plaintiff on "the property" were made as a trespasser upon said premises or were without claim or right or color of title and that the same were made without and against the consent and adversely to the claims of defendants and their predecessors in title; that it is not true that plaintiff is without right or equity in the premises, or is proceeding, or ever did proceed as a trespasser or by force of arms.

XXVI.

The Court erred in holding that it is not true that statements in the patent to the State of California "that the lands therein described were unsurveyed at the time of the issuance of said patent" are untrue, or was and is an error of law, which is

refuted by any record on which said patent is based. [331]

XVII.

The Court erred in holding that it is not true that defendants have an interest in the premises sued for as tenants in common with others, as the record discloses or otherwise, or that as such co-tenants, they are entitled to the possession of said premises under any mesne conveyance from the State of California, as successors of plaintiff, or otherwise, extending to defendants under the Swamp and Overflowed Land Grant to California, of September 28, 1850, or under any other grant.

XXVIII.

The Court erred in holding that it is not true that the patent of the United States, with its recitals, or descriptions, or otherwise, issued to California March 9, 1928, determined the land was part of the public domain on September 28, 1850, and/or was not included in the grant to Castro.

XXIX.

The Court erred in holding that it is not true that the lands described in said Surveys No. 34 and No. 569 were included in Swamp Land Grant of September 28, 1850.

XXX.

The Court erred in holding that about September 16, 1914, California applied to the Commissioner of the General Land Office for certification to it of

lands falsely claimed by it to be indefinitely represented as swamp and overflowed on certain plats approved March 4, 1863, pursuant to R. S. Sec. 2488; that lines on said plats claimed to refer to "the property" in controversy were not survey lines but were merely drawn in; that the application of California was correctly rejected by the Commissioner of the General Land Office, on the ground that the plats did not define the extent of any body of land "notoriously and obviously swamp and overflowed", as specified in R. S. Sec. 2488, or "furnish information indicating that any particular part, great or less, of the lands claimed were [332] wet and unfit for cultivation."

XXXI.

The Court erred in holding that Exhibits "A", "B", and "H", attached to the answers of these defendants, do not depict Mare Island and "Island No. 1" as separate tracts of land or separate islands, but do depict them within a continuous mean high water line, including both "Island No. 1", so-called, and "the property"; that "Island No. 1", as depicted on said charts, is a local place name of recent application and that "the property" would fall partly on "Island No. 1", as designated on said charts; that each of said charts depicts "Island No. 1" and Mare Island as separate tracts of firm land, though not as separate islands; that it is no part of the duties or powers of the persons making said maps to impose local place names on said maps or charts.

XXXII.

The Court erred in holding that it is not true that the imposing on Exhibit "E", annexed to and made a part of the answer of these defendants, of the delimitation of the premises, purported to have been reserved for public use by the said Presidential Orders by the Secretary of the Interior, was a null or void act or that either of said orders was void on its face, and/or without legal effect; that it is true that said act of the Secretary of the Interior could not limit the rights of the United States to lands outside of the area so delineated; that it is not true that at the time of the making of said orders the equitable title to the property had passed under any grant in praesenti, or otherwise, to the State of California under Swamp and Overflowed Land Grant of September 28, 1850, or any other grant, nor was said grant a contract between the United States and California, which inured to the benefit of the answering defendants and/or their co-defendants, as their interests might appear, nor was the President of the United States without authority in law to make either of said executive orders. [333]

XXXIII.

The Court erred in holding that it is not true that Exhibit "A", annexed to plaintiff's Bill of Complaint, is not a copy of the grant to Castro, nor was said purported grant a forgery.

XXXIV.

The court erred in holding that it is not true that said alleged grant was never finally confirmed to said Victor Castro, or to his successors in interest; that it is not true that the area or boundaries embraced within the description contained in the alleged grant has never been determined or ascertained by survey thereof by the United States Surveyor General for California; that it is not true that it was surveyed by Freeman and the Freeman Survey was approved; that it is true that no patent thereof has issued to the confirmee or confirmees, pursuant to the Act of Congress of July 1, 1864, or otherwise, but that such patent is unnecessary, as being simply a confirmation by the United States to the United States, the transferee of the confirmees.

XXXV.

The Court erred in holding that it is not true that by reason of said decision by the Secretary of the Interior identifying "the property" as swamp, the said patent of David M. Darlington was confirmed as of the date of its issuance, pursuant to the provisions of the Act of July 23, 1866, or any Act, or that said confirmation has inured to any of the appearing defendants.

XXXVI.

The Court erred in holding that it is not true that by reason of the purchase of said premises by the United States, subsequent to September 28, 1850, any title or interest acquired by the United

States thereby has inured to any of the defendants or their co-tenants in common, or otherwise, or that plaintiff is estopped to assert the same against the defendants, or any of them, or that the same was or is subordinate in any particular to State Swamp and Overflowed Grant of September 28, 1850, or to any Federal Patent to California therefor. [334]

XXXVII.

The Court erred in holding that it is not true that the said claim of Victor Castro was not reserved by the Treaty of Guadalupe Hidalgo, or by statute of the United States on September 28, 1850; that it is not true that the claim of said Victor Castro was not sub judice on September 28, 1850, or prior thereto, or was subject to disposition otherwise by the United States on said date, or that plaintiff is estopped to deny the validity of its said grant; that it is not true that equitable title of California or any equitable title of these defendants, or any of them, is superior to the title of plaintiff.

XXXVIII.

The Court erred in holding that it is not true that the patent of the United States to California, by relation or otherwise, is of the date of September 28, 1850, or is superior to the decrees of confirmation or superior to said executive orders purporting to reserve said premises for the public use of plaintiff, or that plaintiff is estopped to deny the validity of the same; that it is true that the area of the premises conveyed to plaintiff by Bissell,

Aspinwall, and McArthur, January 4, 1853, was within the boundaries of the survey referred to in said conveyance and that said survey did include Island No. 1, so-called, as delineated on said charts, and the whole thereof, and included all parts of areas embraced in said Swamp and Overflow Survey No. 34 and some of the area embraced in said Swamp and Overflow Survey No. 569; that it is not true that the line depicted on Exhibit "N" as the line of the upland in 1852 was or is the northern boundary of Mare Island or the southern boundary of "the property", or that the northern line of Mare Island, as there depicted, is the Machine Shop depicted on said maps; that Exhibit "M" is not a copy of any decision of the United States Surveyor General for California, relating to the Freeman Survey; but the Freeman Survey was a closed transaction and was finally approved at the time Exhibit "M" was [335] written; that it is not true that a line drawn from Station 54 to Station 138 on the Freeman Survey constitutes the northern boundary of Mare Island or the southern boundary of "the property" or the southern boundary of any Island No. 1, there being no such island as distinct from Mare Island.

XXXIX.

The Court erred in holding that it is not true that plaintiff is estopped to contend in this suit that the Castro Grant was not void in law and not, in fact, a forgery.

XL.

The Court erred in holding that it is not true that in the said application of California for certification, Honorable Curtis D. Wilbur, Secretary of the Navy, disclaimed or abandoned the said executive orders of President Fillmore, reserving Mare Island, or that plaintiff is precluded in any wise from asserting now said executive orders, or any claim other than that of its alleged purchase of Mare Island.

XLI.

The Court erred in holding that it is not true that the Act of Congress, providing for the acquisition of a Navy Yard at Mare Island, made or constituted Caleb Cushing, Attorney General of the United States, a special or any tribunal to determine whether the swamp and overflowed portions of Mare Island, or the swamp and overflowed lands abutting said island, had passed to California under the Swamp and Overflowed Grant of September 28, 1850, or that any exercise of any such jurisdiction determined that such swamp and overflowed lands had passed to California, or that thereupon the plaintiff applied to California for a cession of the overflowed portions of Mare Island, or that on May 11, 1854, California granted any such application to the extent of ceding to plaintiff the swamp and overflowed lands on the easterly side of Mare Island south of a parallel intersecting the northern highland of Mare Island at said Machine [336] Shop, and excluded thereby the said lands north of

said line running east and west and from Ships Channel in Napa River to San Pablo Bay, restricting the cession to the lands so described therein, or that any such restriction, with its conditions, was accepted by the plaintiff, nor is plaintiff estopped to claim otherwise.

XLII.

The Court erred in holding that it is not true that in the mandamus proceeding referred to in the patent of the United States and in plaintiff's Bill of Complaint, it was determined finally that "the property" was part of the public domain on September 28, 1850.

XLIII.

The Court erred in holding that it is not true that the supervising authority of the Secretary of the Interior over public lands of the United States authorized him to issue any instructions or to take any steps in the exercise of his judgment and discretion as he deemed proper for the ascertaining of the fact whether any of the lands in controversy claimed by California in its application for certification, including "the property", were swamp and overflowed lands on September 28, 1850, or that in the exercise of his lawful judgment and discretion he took the steps for such purpose as are detailed in Paragraph XII of the answer filed March 31, 1931; that it is true that save for the powers given the Interior Department by the Land Commission Act, as amended, "the property" has been under the exclusive jurisdiction of the Navy Department.

XLIV.

The Court erred in holding that it is not true that the decisions and records in the suits of San Francisco Savings Union v. Irwin, or Bouldin v. Phelps, are muniments of the title of these defendants or their co-tenants in title, or otherwise, in any controversy between any of said defendants or said co-tenants and the United States; that it is true that none of the facts established in [337] any of said suits are binding or conclusive on plaintiff herein.

XLV.

The Court erred in holding that it is not true that the Cession Act of the State of California of May 11, 1854, is binding on plaintiff as a restriction on plaintiff's claim to any part of the lands granted, held, or claimed by Victor Castro and his successors in interest, or any of them, conveyed to the United States, nor is claimant estopped from claiming title to "the property" or any swamp and overflowed lands in either of said townships or any other township falling on Mare Island as granted, conveyed, and confirmed as above set forth.

XLVI

The Court erred in holding that it is not true that no part of "the property" was on July 23, 1866 occupied by plaintiff or devoted to public use or was unfit for any public use, or that up to July 24, 1866, plaintiff had made no susbtantial improve-

ment or expenditures thereon, and that any alleged occupation of said premises was not open, notorious, and visible to the human eye.

XLVII.

The Court erred in holding that Exhibit "A", attached to the answer of defendants, is a Coast and Geodetic Survey in accordance with the Freeman Survey and binding on plaintiff only so far as it shows the configuration of the coast, and the meanders of the mean high tide line which is the same as the Freeman Survey.

XLVIII.

The Court erred in holding that it is not true that any portion of Mare Island was swamp and overflowed land or public domain of the United States on September 28, 1850, or was subject to the Swamp and Overflowed Grant on said date; that Mare Island passed to the ownership of California on her admission to the Union and was not subject to the reservation of the public use of the United States; [338] that the State of California never consented to the purchase or reservation of any portion of Mare Island, except the portion thereof described in said Cession Act; that the State of California was competent to limit, or was in fact limited by said Cession Act, to a possessing right for the period when Mare Island was occupied by the United States Navy as a Navy Yard or that any condition subsequent was accepted by the

United States or that Mare Island was not, and is not, accessible from any of its sides, owing to the swamp and overflowed lands or the tide lands lying between it and navigable waters.

XLIX.

The Court erred in holding that it is not true that any northern boundary of Mare Island or southern boundary of swamp and overflowed lands later established by State Segregation Swamp and Overflow Survey No. 34, or by any descriptions inserted in the Federal Patent to California, are depicted on Exhibit "P", referred to and incorporated in the answer filed March 31, 1931, or on any other survey by the Coast and Geological Surveys of the United States, or was adopted by the Board of Officers sent to California to select a site for a Navy Yard, or is a boundary survey of said area referred to in the Bissell conveyance to the United States; that it is not true that the lands marked in red lines on the plat of Township 4 North, Range 4 West, approved March 9, 1924 (Exhibit "F"), are any part of "No. 1", but it is true that they are a part of the lands covered by Swamp and Overflow Survey No. 569, all marked on said plat by the surveyor, but not approved by the Secretary of the Interior on the application of California for certification, as alleged in Paragraph XII of the answer of these defendants, March 31, 1931; that it is not true that Exhibit "K", referred to and incorporated in said answer or plaintiff's Exhibit "L-16"

in evidence, is the survey of the Board of Officers sent to California to select a site for a Navy Yard, nor is the only part conveyed and made a part of the said Mare Island by [339] Bissell, Aspinwall, and McArthur; that it is true that said Exhibit "K" is simply a detailed drawing of the proposed improvement of Mare Island; that the survey referred to in the conveyance by Bissell, Aspinwall and McArthur to the United States and in the selection by Secretary Kennedy and the reservation by President Fillmore is the survey and plat of Mare Island made by Cadwallader Ringgold in his chart of San Francisco Bay; that it is not true that Exhibit "K" is the controlling description of the conveyance from Bissell, Aspinwall, and McArthur to the United States, nor that said survey follows the water's edge or the natural boundaries of Mare Island throughout their entire extent or embraces the entire area of Mare Island, or all of the lands that were granted to Victor Castro and by him conveyed to the predecessor in title of the United States; that it is not true that the Navy Yard plan, attached to said exhibit, also shows the area of Mare Island or the southerly line of "the property", nor does the same exclude the areas in said State Surveys Nos. 34 and 569.

L.

The Court erred in holding that it is not true that the patent of the United States to California approved said State Surveys Nos. 34 and 569, or said

State patent to said Darlington; nor, on issuance of said patent to the State of California, did the fee simple title of the United States vest in California as of the date of September 28, 1850; that it is not true that all or any subsequent action on the part of the plaintiff since that time by purchase, as alleged in the Bill of Complaint, or by reservation for public use, is null and void.

LI.

The Court erred in holding that the patent to the State of California is subject to collateral attack by plaintiff in a suit to quiet title under the laws of the State of California and of the United States, and in an action to cancel surveys by its own land officers and the approved surveys of the State and its own patent [340] executed in connection with the subject matter of this suit and the alleged claim of Swamp and Overflowed Grant; that nothing done on March 9, 1928, by the United States, or any of its officers, approved or in any wise validated any of the acts done or performed by California and its grantees, or in respect to the lands in controversy.

LII.

The Court erred in holding that it is not true that James E. O'Donnell is the owner in title, or otherwise, with his co-defendants, of 30/100, or any interest, or otherwise; that it is not true that Walter E. Burke, as Trustee, or otherwise, is entitled, as tenant in common, or otherwise, to 27/100, or any

interest, undivided or otherwise; that it is not true that the Estate of Edmund Burke is entitled to the possession of an interest in common, or otherwise, of 3/100, or any interest, undivided or otherwise; none of the defendants, Flethcer M. Slosson, Frances Morse, Eleanor Caroline Whitman, are entitled to 40/100 undivided interest, or any interest, in common or otherwise; none of the defendants are entitled to any interest, in common or otherwise, in the premises in controversy.

LIII.

The Court erred in holding that it is not true that the patent of the United States, issued March 9, 1928, was duly issued in the absence of fraud, imposition, and/or mistake, but that it is true that said patent was issued under a mistake as to the power of the Land Office and a mistaken supposition that the land in controversy was public domain of the United States on September 28, 1850; that it is not true that the patent conveyed the legal title thereto to the State of California, or is any evidence thereof as of the date of September 28, 1850; that it is not true that any subdivisional survey of said lands was made by authority of the United States under the provisions of the Act of July 26, 1866, or that any survey of the lands returned any of "the property" as swamp and overflowed lands on September 28, 1850, or that amongst any of the lands [341] so returned were any premises described in State Swamp and Overflow Survey

No. 34; nor was any description approved or adopted by the United States or carried into its patent to the State of California as its terms of description; that it is not true that any accretions, natural or artificial, appertaining or accruing to "the property" have become a part thereof, nor that plaintiff has no right, title, or interest therein nor to any part thereof beyond or north of the line or parallel, intersecting the northrly highland of Mare Island; whose northerly boundary is not the boundary of Mare Island existing in 1852; shown on defendants' Exhibit "B", referred to and incorporated in their answers, nor was said line the line established by the survey referred to by plaintiff's Exhibit "C"; nor was plaintiff at the time this action was filed, nor is it now, in possession of said survey.

LIV.

The Court erred in holding that it is not true that the grant by Juan B. Alvarado to Victor Castro did not embrace "the property".

LV.

The Court erred in holding that in 1877, pursuant to the authority given him by law, the Surveyor General for California caused the land confirmed in the Bissell and Aspinwall confirmation to be surveyed by Freeman, and thereafter approved said survey; that said survey was thereafter duly approved by the Commissioner of the General Land Office and said approved survey was in all respects validated by said final decree of confirmation.

LVI.

The Court erred in holding that it is not true that the claim of Victor Castro was inferior or subordinate in legal character to the Swamp and Overflowed Land Grant of September 28, 1850, or to the Federal patent to the same by the plaintiff to California; that said patent did not, by relation, become effective as of the date of September 28, 1850. [342]

LVII.

The Court erred in holding that it is not true that the confirmation referred to in Paragraph V of plaintiff's Bill of Complaint did not embrace "the property" or any part thereof; that it is true that said conveyance embraced all of "the property"; that it is not true that the executive order referred to in Paragraph VI of plaintiff's Bill of Complaint did not embrace "the property" or any part thereof, but that it is true that said executive order embraced all "the property".

LVIII.

The Court erred in holding that it is not true that the executive order referred to in Paragraph VII did not embrace "the property", or any part thereof, but that it is true that it embraced the whole thereof; that it is not true that the possession taken by plaintiff of "the property" was secured by trespass or without right or color of title; that it is not true that until March 9, 1928, any of these defendants were without legal capacity to maintain any legal action or equitable proceedings to recover pos-

session of said premises or to quiet the title of them, or any of them, in or to "the property", or that defendants had no legal or actual remedy to compel, any alleged trespass or entry of plaintiff, or of its officers, agents, or attorneys; that it is not true that these defendants, or any of them, did everything they could to resist any entries, intrusions, or alleged trespass of the plaintiff or its agents, prior to its acquiring said Federal patent to the State of California.

LIX.

The Court erred in holding that it is not true that any of the allegations in Paragraph XII of plaintiff's Bill of Complaint are a collateral attack on any final decree or judgment of the Supreme Court of the District of Columbia; that it is not true that the United States of America was not a real or substantial party to the mandamus proceeding referred to and is not concluded by any [343] judgment rendered therein; that it is not true that "the property" was a part of the public domain on September 28, 1850; that it is not true that any township survey, including field notes or report of the surveyor, were approved or accepted by the Secretary of the Interior or returned any of said premises as swamp and overflowed land, as provided in and directed by the terms and provisions of the Act of July 23, 1866; nor did said, or any, identification confirm said patent issued by the State of California to David M. Darlington.

LX.

The Court erred in finding and holding that it is not true that the United States Surveyor General for California, in the exercise of his judgment or discretion, determined that the northerly boundary of Mare Island extended to a point or station on San Pablo Bay to a point or station on the Napa River, the first station being designated on Freeman's Survey as Station 34 to said second Station No. 138; that it is not true that said alleged decision, so-called, of said Surveyor General was never modified by the Secretary of the Interior or was in full force or effect on the day the said fee simple title issued by the plaintiff to the State of California; that it is not true that the said line is a northern line of Mare Island, or is a southern boundary line of "the property", nor does the northern boundary of Mare Island closely approximate the parallel intersecting the northerly highlands of Mare Island, as depicted on defendants' Exhibit "B".

LXI.

The Court erred in holding that plaintiff is entitled to a judgment and decree, adjudging and decreeing that complainant is the owner in fee simple absolute and possessed of all the real property described in Paragraph II of plaintiff's Bill of Complaint, being the lands described and attempted to be described in said Swamp and Overflow Survey No. 34 and in the patent of said lands from the [344] United States to the State of California.

LXII.

The Court erred in holding that plaintiff is entitled to a judgment and decree; that neither of the defendants, or any, have any right, title, or interest in or to said lands, or any part thereof, by reason of the purported patents, conveyances, or instruments mentioned, or referred to in plaintiff's Bill of Complaint; and adjudging and decreeing that the conveyances and instruments, through and by virtue of which these defendants claim to derive a right, title or interest in the lands in question under David M. Darlington, particularly from the State of California, and his grantees are void and of no effect; and that each such conveyance made to him and made by these defendants be held for naught, surrendered up to and delivered up to the Court for cancellation.

LXIII.

The Court erred in holding that plaintiff is entitled to a judgment and decree, adjudging and decreeing title in and to the lands described in Paragraph II of plaintiff's Bill of Complaint be quieted as against all or any adverse claim of claims of defendants herein, or any of them, and that defendants be enjoined and restrained from asserting any rights contrary to the right, title and interest of plaintiff; that plaintiff recover its costs of suit.

LXIV.

The Court erred in ordering entry of a decree herein in favor of complainant and against these defendants.

LXV.

The Court erred in failing to grant to these defendants the relief prayed for in their several answers on file herein.

LXVI.

The Court erred in denying defendants' motion to strike certain parts of the Bill of Complaint filed May 13, 1932, and each and every part of said motion, for the reasons and upon the grounds there- [345] in stated.

LXVII.

The Court erred in denying the written motion of defendants under reserved objections, and each and every separate motion therein contained, to exclude certain testimony offered by plaintiff, filed May 13, 1932, for each and every one of the grounds therein set forth.

LXIX.

The Court erred in denying the motion of the defendants to dismiss the Bill of Complaint under reserved exceptions, and each and every one of the motions therein contained, for each and every one of the reasons and upon each and every one of the grounds therein set forth.

JAMES E. O'DONNELL, et al.,
Defendants.

JAMES E. KELBY
SAMUEL M. GARROWAY
GORDON LAWSON
Solicitors for Defendants.

[Endorsed]: Service of the within Assignment of Errors by copy admitted this 10th day of April 1934.

H. H. McPIKE
Attorney for.....

Filed Apr. 10, 1934. [346]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING APPEAL BOND.

Notice of Appeal and Assignment of Errors having been filed in this Court by the defendants herein, on or about the 10th day of April, 1934;

NOW, THEREFORE, IT IS ORDERED that the said Appeal be and the same is hereby allowed; that the amount of defendants' bond on said Appeal be and the same is hereby fixed in the sum of One Thousand Dollars ($1,000.00), the same to act as supersedeas of the Judgment for Costs and Disbursements heretofore entered against said defendants.

It is further ordered that upon the filing of such security, a certified transcript of the record and proceedings herein, in accordance with the statutes and equity rules, be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Dated: April 10, 1934.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Apr. 10, 1934. [347]

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
BALTIMORE 3964509

In the District Court of the United States, Northern District of California, Southern Division.

UNITED STATES OF AMERICA,

Complainant,

vs.

JAMES E. O'DONNELL, et al.,

Defendants.

STIPULATION FOR COSTS ON APPEAL
No. Equity 2787-S.

KNOW ALL MEN BY THESE PRESENTS, That FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto United States of America, Complainant in the above entitled case, in the penal sum of One thousand and no/100 ($1,000.00) Dollars, to be paid to the said Complainant, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That Whereas, James E. O'Donnell, et al., Defendants, are about to take an appeal to the United States Circuit Court of Ap-

peals for the Ninth Circuit to reverse the Order made on ....., 19...., and decree made and entered on the 17th day of January, 1934, by the United States District Court for the Northern District of California, Southern Division, in the above entitled case.

NOW, THEREFORE, if the above named appellants shall prosecute said appeal to effect and answer all costs which may be adjudged against them if they fail to make good their appeal, then this obligation shall be void; otherwise to remain in full force and effect.

This recognizance shall be deemed and construed to contain the "express agreement" for summary judgment and execution thereon mentioned in rule 34 of the District Court.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND
By D. E. GORTON
Attorney in Fact

Attest C. A. BEVANS [Seal]
Agent

Approved this 10th day of April, 1934.

A. F. ST. SURE
District Judge

Examined and recommended for approval as provided in Rule 29.

JAMES E. KELBY
GORDON LAWSON
SAMUEL M. GARROWAY
Attorneys for Appellants. [348]

State of California,
City and County of San Francisco.—ss.

On this 20th day of March, A. D. 1934 before me F. R. Webb, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared D. E. Gorton, Attorney-in-Fact, and C. A. Bevans, Agent, of the Fidelity and Deposit Company of Maryland, a corporation, known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the Attorney-in-Fact and Agent respectively of said corporation, and they and each of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney-in-Fact and Agent respectively.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year first above written.

[Seal] F. R. WEBB

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr. 10, 1934. [349]

[Title of Court and Cause.]

STIPULATION AND ORDER RE TRANSMITTAL OF EXHIBITS TO CIRCUIT COURT OF APPEALS.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective attorneys of record, that the following original exhibits offered and received in evidence in the above-entitled cause, may be withdrawn from the files of the above entitled court, and of the clerk thereof, and by said clerk be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, as a part of said record on appeal, for the purpose of being considered and used by said appellate court on this appeal, with the same force and effect as though the same were incorporated in and made a part of the transcript on appeal.

That upon the determination of said appeal, all of said original exhibits shall be returned to the files of the above-entitled court.

The exhibits covered by this stipulation are as follows, to-wit:

PLAINTIFFS' EXHIBITS:

1. Plaintiff's Exhibit A, Dyer Survey, 1863.
2. Plaintiff's Exhibit B, Joy Survey, 1923.
3. Plaintiff's Exhibit F, Smith Board report.

[350]

4. Plaintiff's Exhibit G, Sloat Board report.
5. Plaintiff's Exhibit J, transcript of mandamus proceedings, U. S. vs. O'Donnell. (Three copies of this transcript, in addition to the original, are to

be furnished to the court on the hearing of this appeal.

5a. Plaintiff's Exhibit K, certified copy patent to California.

6. Plaintiff's Exhibit L1, Map—1775 (Photostat copy and translation.

7. Plaintiff's Exhibit L2, Map— (Mexican map and translation).

8. Plaintiff's Exhibit L3, Map—Mexico 1876 (Photostat copy).

9. Plaintiff's Exhibit L4, Map—1781 (photostat copy).

10. Plaintiff's Exhibit L5, Map—1825.

11. Plaintiff's Exhibit L6, Map—1798.

12. Plaintiff's Exhibit L6a, Map—1789.

13. Plaintiff's Exhibit L7, Map—1827-8.

14. Plaintiff's Exhibit L8, Map—1841.

15. " " L8, Map—1848.

16. " " L8b, Map—1849.

17. " " L9, Map—1849.

18. " " L10, Map—1851.

19. " " L11, Map—1850.

20. " " L12, Map—1850.

21. " " L13, Map—1850.

22. " " L13a, Map—1850.

23. " " L13b, Map—1852.

24. " " L14, Map—1849.

25. " " L16, Map—Top—1851.

26. " " L17, Map—1851.

27. " " L18, Map—1856.

28. " " L19, Map—1856.

29. " " L20, Map—1856. [351]

30. Plaintiff's Exhibit L21, Map—1856.
31. " " L22, Notes—1856.
32. " " L23, Map—1859.
33. " " L24, Map—1861.
34. " " L25, Map—1863.
35. " " L26, Map—1876.
36. " " L27, Map—1886.
37. " " L28, Map—March, 1916.
38. " " L29, Map—Feb. 2, 1915.
30. " " L30, Map—June 30, 1931—5533.
40. " " L31, Map—Nap. 1896-1899.
41. " " L8c, Map—copy Plat No. 16.
42. " " L31a, Map.
43. " " L32, Gibbs Map.
44. " " L33—Map.
45. " " L34, Map.
46. " " L35, Map.
47. " " L36, Map.
48. " " L37, Map.
49. " " L38, Map.
50. " " M, Report of Sanger Board, 1873.
51. " " N, photostat of map from Volume 6, page 5, Bancroft's History of California.
52. Plaintiff's Exhibit V, topographical map showing stations from which sand was taken.
53. Plaintiff's Exhibit Z, Freeman map, and accompanying file of documents in Freeman's Survey.

54. Plaintiff's Exhibit BB, part of probate proceedings of Edwin K. Sawyer.

55. Plaintiff's Exhibit GG and Plaintiff's Exhibit HH, Plat XI, Photostat of Mare Island.

56. Plaintiff's Exhibit II and Defendant's Exhibit 8, Tracing of Mare Island, Patton, etc. [352]

57. Plaintiff's Exhibit JJ, tracing of Map of 1861 of Mare Island.

58. Plaintiff's Exhibit KK, tracing of map of 1872-3, of Navy Yard.

59. Plaintiff's Exhibit OO, Relief Map prepared by Captain Carlson.

60. Plaintiff's Exhibit PP, Hillyard map.

61. Plaintiff's Exhibit RR (Defendant's Exhibits for Identification, No. 4 and No. 7).

62. Plaintiff's Exhibit TT (Navy Yard map showing contour, testified to by Captain Carlson.

63. Plaintiff's Exhibit UU, Map. (Part of Defendants' Exhibit 11 for identification).

64. Plaintiff's Exhibit VV, copy of Freeman's Survey.

65. Plaintiff's Exhibit WW, blueprints.

66. Plaintiff's Exhibit XX, large map of Mare Island and vicinity, and photostat of same.

DEFENDANTS' EXHIBITS.

67. No. 2, for identification, Map, McKay, 1910.

68. No. 3, for identification, Blue Print C. 242, etc.

69. No. 5, for identification, Map, State of California 1854.

70. No. 6, for identification, Map, 1925.

71. No. 9, for identification, Map, Mare Island Navy Yard.

72. No. 11, for identification, Letter and Map.

73. No. 12, Map.

74. No. 13, Photostatic copy map—Glover—1921 to 1923. [353]

75. No. 14, Map—1865.

76. No. 15, Map—1863.

77. No. 16, Map—1923.

78. No. 19, Certified copy field notes 315, 316, 317 and 318, Volume 396.

79. No. 26, Map—Beale.

80. No. 27, Notes and Map, 1856.

81. No. 28, Mare Island Straits—(Map).

82. No. 29, Chart, California—Mare Island Triangle.

San Francisco, California, May 25, 1934.

H. H. McPIKE,
United States Attorney.
ROBERT B. McMILLAN,
Asst. U. S. Atty.
ESTHER B. PHILLIPS,
Asst. U. S. Atty.
Attorneys for Complainant.
JAMES E. KELBY,
GORDON LAWSON,
Attorneys for Defendants.

On reading the above stipulation and good cause appearing therefor, IT IS HEREBY ORDERED

that an order may be made and entered in accordance therewith.

San Francisco, California, May 25, 1934.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed May 28, 1934. [354]

[Title of Court and Cause.]

STIPULATION AND ORDER FOR TRANSMITTAL OF ORIGINAL EXHIBITS BY CLERK OF THE UNITED STATES DISTRICT COURT TO THE CLERK OF THE CIRCUIT COURT OF APPEALS FOR PRINTING SAID EXHIBITS AS A PART OF THE TRANSCRIPT ON APPEAL.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective attorneys of record, that an order be made by the above-entitled court, authorizing and directing the clerk of this court to withdraw from the files of the above-entitled cause the original exhibits hereinafter enumerated and to deliver said exhibits to the clerk of the Circuit Court of Appeals for the Ninth Circuit, to be by him printed in the transcript of the record on the appeal taken in said cause to said Circuit Court of Appeals.

That when so printed, said original exhibits are to be returned to the files of this court.

The original exhibits covered by this stipulation are as follows:

1. Plaintiff's Exhibit C (Record in U. S. vs. Bissell, No. 311 U. S. Dist. Ct.

2. Plaintiff's Exhibit E (Bissell—Aspinwall deeds and papers accompanying same.

3. Plaintiff's Exhibit F, Smith Board report. (Maps accompanying this exhibit need not be printed, nor photostatic copies made of same.

4. Plaintiff's Exhibit G, Sloat Board report. (Maps and plans accompanying this exhibit need not be printed, nor photostatic copies made of same. [355]

5. Plaintiff's Exhibit H, letter February 9, 1853; letter February 12, 1853.

6. Plaintiff's Exhibit I, certified copy of Darlington Survey.

7. Plaintiff's Exhibit M, report of Sanger Board, 1873. (Maps accompanying this exhibit need not be printed, nor photostatic copies made).

8. Plaintiff's Exhibit O, photostatic copy of corrected report, Spanish and Mexican grants to California.

9. Plaintiff's Exhibit P, letter of Commissioner Richards to Secretary of the Interior, September 22, 1905.

10. Plaintiff's Exhibit Q, decision of Commissioner Tallman, September 16, 1914.

11. Plaintiff's Exhibit R, letter of Secretary of Navy to Secretary of Interior, February 12, 1925.

12. Plaintiff's Exhibit S, certified copy of field notes and report of James E. Freeman.

13. Plaintiff's Exhibit T, report of W. J. Lightfoot, January 6, 1915.

14. Plaintiff's Exhibit U, report of Francis E. Joy, October 23, 1922.

15. Plaintiff's Exhibit W, photostat from history of Solano and Napa Counties.

16. Plaintiff's Exhibit X, certified copy of record and map from United States vs. Pacheco.

17. Plaintiff's Exhibit Y, notice in "Daily Alta", California.

18. Plaintiff's Exhibit Z, file of documents in Freeman Survey. (Freeman Map accompanying this exhibit need not be printed, nor photostatic copies made of same.)

19. Plaintiff's Exhibit Z1, file of letters.

20. Plaintiff's Exhibit AA, documents, Third Session, 46th Congress. [356]

21. Plaintiff's Exhibit CC, record of certification of school land warrants, Solano County.

22. Plaintiff's Exhibit DD, survey found at pages 114 and 115 of same record.

23. Plaintiff's Exhibit EE, log of Mare Island from time of first commandant, Commodore Farragut.

24. Plaintiff's Exhibit FF, letter of Commandant Rogers to Commodore Rogers, February 26, 1873.

25. Plaintiff's Exhibit LL, letter of John Rodger to Board of Supervisors of Solano County.

26. Plaintiff's Exhibit MM, tidal planes.

27. Plaintiff's Exhibit NN, cross-section of Mare Island prepared by Captain Carlson.

28. Plaintiff's Exhibit QQ, letter of John Rodger to Robert Gardner, February 24, 1873, and letter

of Gardner to Rodger, November 25, 1873.

29. Plaintiff's Exhibit SS, letter of Edward T. Nichols to William Chandler, dated December 22, 1883.

30. Plaintiff's Exhibit YY, criticisms of map of 1854.

San Francisco, California, May 22, 1934.

H. H. McPIKE,
U. S. Attny.

ROBERT B. McMILLAN,
ESTHER B. PHILLIPS,
Attorneys for Complainant.

JAMES E. KELBY,
GORDON LAWSON,
Attorneys for Defendants.

On reading the above stipulation and good cause appearing therefor, IT IS HEREBY ORDERED that an order may be made and entered in accordance therewith.

San Francisco, California, May 25, 1934.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed May 28, 1934. [357]

[Title of Court and Cause.]

AMENDED PRAECIPE.

To the Clerk of the above entitled Court:

Please prepare a transcript of record to the United States Circuit Court of Appeals, upon which the appeal heretofore taken by defendants from the

final decree in the above entitled cause shall be heard, including therein the following documents:

1. Bill of complaint.
2. Stipulation for amended pleadings.
3. Amendment to amended bill of complaint.
4. Answer of defendants James E. O'Donnell, Fletcher M. Slosson, Frances Morse, Eleanor Caroline Whitman, Edmund Burke, and Walter E. Burke, as trustee, etc.
5. Answer of defendant Edmund Burke.
6. Joint and several answer of James E. O'Donnell and Juanita E. O'Donnell.
7. Joint and several answer of defendants Fletcher M. Slosson, Dorothy Slosson, Frank Clifford Morse, Frances Morse, Eleanor Caroline Whitman, and Alfred Whitman.
8. Answer of Frank R. Devlin to Bill of Complaint.
9. Substitution of Kelby & Lawson for Messrs. Athearn, Chandler, & Farmer and Frank R. Devlin, as solicitors for certain defendants.
10. Answer of defendant Villa M. Behan, filed January 7, 1931.
11. Order reviving action against defendants Walter E. Burke, [358] Administrator of the Estate of Edmund Burke, upon the death of Edmund Burke.
12. Stipulation that answer of Edmund Burke be deemed the answer of Walter E. Burke, as Administrator of the Estate of Edmund Burke, to amended complaint.
13. Motions and orders denying motions of defendants to dismiss bill as amended and to strike

out certain parts of the bill and to exclude certain testimony and exhibits offered by plaintiff and received in evidence.

14. Petition and order substituting Villa M. Behan, formerly Villa M. Burke, in place and stead of Walter E. Burke, as Administrator of the estate of Edmund Burke, deceased, filed February 13, 1934.

15. Petition and order substituting Villa M. Behan, formerly Villa M. Burke, in her own proper person in place and stead of Walter E. Burke, as trustee for Villa M. Behan, formerly Villa M. Burke, filed February 13, 1934.

16. Findings of fact and conclusions of law.

17. Decree.

18. Notice of appeal.

19. Assignment of errors.

20. Order allowing appeal and fixing appeal bond.

21. Citation.

22. Appeal bond.

23. Condensed statement of evidence.

24. Order approving narrative statement of evidence.

25. Amended praecipe.

26. Certificate of Clerk.

27. The following exhibits:

Plaintiff's Exhibit "A", Dyer Survey, 2 Maps—1863.

Plaintiff's Exhibit "B", Joy Survey—1923.

" " "C", Record in Case

No. 311, U. S. v. Bissell, et al., U. S. District Court.

Plaintiff's Exhibit "F", Report of Smith Board, etc.

Plaintiff's Exhibit "G", Report of Sloat Board, Report and Plans. [359]

Plaintiff's Exhibit "HH", Letter dated February 12, 1853.

Plaintiff's Exhibit "J", Mandamus Proceedings #4561.

Plaintiff's Exhibit "L1", Map—1775 (Photostat copy and translation).

Plaintiff's Exhibit "L2", Map—(Mexican Map and translation).

Plaintiff's Exhibit "L3", Map—Mexico 1876 (Photostat Copy).

Plaintiff's Exhibit "L4", Map—1781 (Photostat Copy).

Plaintiff's Exhibit "L5", Map—1825 (Photostat Copy).

Plaintiff's Exhibit "L6", Map—1798.

" " "L6a", Map—1789.

" " "L7", Map—1827-8.

" " "L8", Map—1841.

" " "L8a", Map—1848.

" " "L8b", Map—1849.

" " "L9", Map—1849.

" " "L10", Map—1851.

" " "L11", Map—1850.

" " "L12", Map—1850.

" " "L13", Map—1850.

Plaintiff's Exhibit "L13a", Map—1850
" " "L13b", Map—1852.
" " "L14", Map—1849.
" " "L15", Letter (correspondence) Nov. 28, 1849.
" " "L16", Map—Top—1851.
" " "L17", Map—1851.
" " "L18", Map—1856.
" " "L19", Map—1856.
" " "L20", Map—1856.
" " "L21", Map—1856.
" " "L22", Notes—1856.
" " "L23", Map—1859.
" " "L24", Map—1861.
" " "L25", Map—1863.
" " "L26", Map—1876. [360]
" " "L27", Map—1886.
" " "L28", Map—March 1916
" " "L29", Map—Feb. 2, 1915.

Plaintiff's Exhibit "L30", Map—June 30, 1931—5533.

Plaintiff's Exhibit "L31", Map—Map. 1896-1899.

Plaintiff's Exhibit "M", Record of Sanger Board 1873 and 3 Maps.

Plaintiff's Exhibit "N", Map.
" " "O", Spanish, etc. grants —Cal.

Plaintiff's Exhibit "P", Letter—Sept. 22, 1905.

Plaintiff's Exhibit "Q", Decision of Sept. 11, 1914.

Plaintiff's Exhibit "R", Letter—Feb. 12, 1925.

Plaintiff's Exhibit "T", Report Lightfoot.

" " "U", Report Joy—1915.

" " "V", 7 Pages Atlas for Identification. Introduced as Exhibit L38.

Plaintiff's Exhibit "W", Photostat Copy—Biography of E. H. Sawyer, and other papers.

Plaintiff's Exhibit "X", Certified copy decision and map. In U. S. v. Pacheco.

Plaintiff's Exhibit "Y", Advertisement—Daily Alta—Nov. 8, 1877, Page 4.

Plaintiff's Exhibit "Z", Copies Letters, etc.

" " "Z1", Copy—Letters.

" " "AA", Copy from Report of Surveyor General, 1878-1879.

Plaintiff's Exhibit "BB", Copy Will of B. H. Sawyer.

Plaintiff's Exhibit "CC", Photostat Copy Survey.

Plaintiff's Exhibit "DD", Photostat Copy Survey.

Plaintiff's Exhibit "EE", Certified Copy Log Book—U. S. Navy Yard, Sept. 16, 17, 18 and 19, 1854.

Plaintiff's Exhibit "FF", Copy Letter—Sept. 26, 1875.

Plaintiff's Exhibit "GG", Plat XI.

"HH", Photo—(Long).

"II", Tracing and Blue Print. [361]

Plaintiff's Exhibit "JJ", Photostat "Sketch of part of Mare Island showing location of Navy Yard and Magazine." Sept. 14, 1861.

Plaintiff's Exhibit "KK", Photostat Plan—"Navy Yard, Mare Island, Cal." 1872-1873.

Plaintiff's Exhibit "LL", Letter—Nov. 25, 1873.

Plaintiff's Exhibit "MM", Tidal Regimen—Mare Island Strait, (3 sheets).

Plaintiff's Exhibit "NN", Cross Sections—Plate IV. Physical Changes—Mare Island.

Plaintiff's Exhibit "OO", Relief Map (and two photographs).

Plaintiff's Exhibit "PP", Hilgard Map (Defendant's 10 for identification).

Plaintiff's Exhibit "QQ", 2 Letters—Nov. 24, 1873, and Nov. 25, 1873.

Plaintiff's Exhibit "RR", 2 Maps—(Defendant's 4 and 7, for identification).

Plaintiff's Exhibit "SS", Letter—Dec. 22, 1883.

Plaintiff's Exhibit "TT",—(Large Blue Print).

Plaintiff's Exhibit "UU", Map. (Part—defendant's Ex. 11, for identification).

Plaintiff's Exhibit "VV", Plate VIII—Present sand content of soil, etc.

Plaintiff's Exhibit "WW", Blue Print.
" " "XX", Large Map of Mare Island and vicinity, and Photo of same.
Plaintiff's Exhibit "YY", Mem. concerning Official Map of California of 1854.
Plaintiff's Exhibit "L8c", Map.—Copy Plat No. 16.
Plaintiff's Exhibit "L31a", Map.
" " "L32", Gibbs Map.
" " "L33", Map.
" " "L34", Map.
" " "L35", Map.
" " "L36", Map.
" " "L37", Map.
" " "L38", Map.

DEFENDANTS' EXHIBITS.

No. 1—for identification—Certificate of Redemption of Real Estate. Introduced as part of Exhibit "W".
No. 2—for identification—Map. McKay 1910.
[362]
No. 3—for identification—Blue Print Map C. 242, etc.
No. 4—for identification—Blue Print 569. Introduced as Plaintiff's Exhibit "RR".
No. 5—for identification—Map. State of California. 1854.
No. 6—for identification—Map. 1925.
No. 7—for identification—Map. Introduced as Plaintiff's Exhibit "RR".

No. 8—for identification—Map—1900. Introduced with Plaintiff's Exhibit "II".

No. 9—for identification—Map. Mare Island Navy Yard.

No. 10—for identification—Map Blue Print. Introduced as Plaintiff's Exhibit "PP".

No. 11—for identification—Letter and Map.

No. 12—Map.

No. 13—Photostatic copy Map—Glover—1921 to 1923.

No. 14—Map—1865.

No. 15—Map—1863.

No. 16—Map—1923.

No. 17—Certified Copy excerpt of History of Napa and Solano Counties.

No. 18—Certified Copy of Stipulation Boulden v. Phelps, No. 2965. Old cases.

No. 19—Certified Copy—Field Notes 315, 316, 317, and 318, Volume 396.

No. 20—List No. 208—Swamp, etc. Land.

No. 21—Certified Copy Patent.

No. 22—Page 64,—Survey 569.

No. 23—Copy Record of Patent. Survey 569.

No. 24—Copies—Communication, etc.

No. 25—List of Swamp, etc. Lands in Cal. (38).

No. 26—Map—Beale.

No. 27—Notes and Map. 1856.

No. 28—Mare Island Straits—(Map).

No. 29—Chart—Calif.—Mare Island Triangle.[363]

28. Stipulation and order re transmittal of exhibits to court of appeals.

Dated: this 2nd day of May, 1934.

JAMES E. KELBY,
GORDON LAWSON,
SAMUEL M. GARROWAY,
Solicitors for Defendants.

AFFIDAVIT OF MAILING.

United States of America,
Southern District of California,
Central Division.—ss.

ADELE LEVENSON, being first duly sworn, deposes and says:

That she is a citizen of the United States, over the age of 18 years, and not a party to the above entitled action; that on the 2nd day of May, 1934, she served the within and foregoing Amended Praecipe in the above entitled action on H. H. McPIKE, United States Attorney, Post Office Building, San Francisco, California, by depositing a true copy of said Amended Praecipe in the United States Mails at the City of Los Angeles, California, with postage prepaid, to the said H. H. McPike, at the address aforesaid, and that at all times herein mentioned there has been, and now is, regular mail service between the City of San Francisco and the City of Los Angeles.

ADELE LEVENSON

Subscribed and sworn to before me this 2nd day of May, 1934.

[Seal] SAMUEL M. GARROWAY
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed May 3, 1934. [364]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of said Court:

Sir:

In addition to the documents and exhibits set forth in the Amended Praecipe of the above-named defendants for preparation of Transcript of Record on Appeal, filed herein on May 3, 1934, the above-named complainant desires incorpoated into the said Transcript the following documents and exhibits:

1. Plaintiff's Exhibit "D", Castro Grant and translation;

2. Plaintiff's Exhibit "E", Bissell and Aspinwall Deed and papers accompanying same;

3. Plaintiff's Exhibit "H", letters of February 9, 1853 and February 12, 1853;

4. Plaintiff's Exhibit "I", certified copy of Darlington Survey;

5. Plaintiff's Exhibit "S", field notes and documents accompanying same.

Dated: May 9, 1934.

H. H. McPIKE
United States Attorney,
Solicitor and Attorney for Complainant. [365]

[Title of Court and Cause.]

AFFIDAVIT OF MAILING.

United States of America,
Northern District of California,
Southern Division.—ss.

R. B. McMILLAN, being first duly sworn, deposes and says: That he is a citizen of the United States, over the age 21 years, and not a party to the above-entitled action; that on the 9th day of May, 1934, he served the within and foregoing Praecipe in the above-entitled action on Messrs. James E. Kelby, Gordon Lawson, and Samuel M. Garroway, 705 Signal Building, 811 West Seventh Street, Los Angeles, California, Solicitors and attorneys for the above-named defendants, by depositing a true copy of said Praecipe, together with a true copy of this Affidavit of Mailing, in the United States mails at the City of San Francisco, State of California, with postage prepaid thereon, to the said Messrs. James E. Kelby, Gordon Lawson, and Samuel M. Garroway at the address aforesaid, and that at all times herein mentioned there has been, and now is, regular mail service between the said City of San Francisco and the said City of Los Angeles.

R. B. McMILLAN

Subscribed and sworn to before me this 9th day of May, 1934.

[Seal] J. P. WELSH

Deputy Clerk of the U. S. District Court, Northern District of California.

[Endorsed]: Filed May 9, 1934. [366]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL.

I, WALTER B. MALING, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 366 pages, numbered from 1 to 366, inclusive, contain a full, true, and correct transcript of the records and proceedings in the cause entitled United States of America, vs. James E. O'Donnell, et al. In Equity No. 2787-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $57.70 and that the said amount has been paid to me by the Attorneys for the appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of June, A. D. 1934.

[Seal] WALTER B. MALING
Clerk.

J. P. Welsh
Deputy Clerk. [367]

United States of America.—ss.

The President of the United States of America
To United States of America, Greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be

holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein JAMES E. O'DONNELL, JUANITA O'DONNELL, his wife, FLETCHER M. SLOSSON, DOROTHY SLOSSON, his wife, FRANK CLIFFORD MORSE, FRANCES MORSE, his wife, ELEANOR CAROLINE WHITMAN, formerly ELEANOR CAROLINE FRENCH, ALFRED WHITMAN, her husband, VILLA M. BEHAN, formerly VILLA M. BURKE, substituted in the place and stead of WALTER E. BURKE, as administrator of the Estate of Edmund Burke, deceased, VILLA M. BEHAN, formerly VILLA M. BURKE, substituted in her own proper person in the place and stead of WALTER E. BURKE, as trustee for VILLA M. BEHAN, formerly VILLA M. BURKE, are appellants, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE, United States District Judge for the Northern District of California, this 10th day of April, A. D. 1934.

A. F. ST. SURE
United States District Judge.

Receipt of a copy of the above citation on appeal admitted this 10th day of April, 1934.

H. H. McPIKE
Attorneys for Complainant. [368]

[Endorsed]: No. 7522. United States Circuit Court of Appeals for the Ninth Circuit. James E. O'Donnell, Juanita O'Donnell, His Wife, Fletcher M. Slosson, Dorothy Slosson, His Wife, Frank Clifford Morse, Frances Morse, His Wife, Eleanor Caroline Whitman, formerly Eleanor Caroline French, Alfred Whitman, Her Husband, Villa M. Behan, formerly M. Burke, substituted in the place and stead of Walter E. Burke, as Administrator of the Estate of Edmund Burke, Deceased, Villa M. Behan, formerly Villa M. Burke, substituted in her own proper person in the place and stead of Walter E. Burke, as trustee for Villa M. Behan, formerly Villa M. Burke, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed June 18, 1934.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 7522

JAMES E. O'DONNELL ET AL., APPELLANTS

v.

UNITED STATES

Upon appeal from the District Court of the United States for the Northern District of California, southern division

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Tuesday, October 15, 1937

Before DENMAN, MATHEWS, and HANEY, Circuit Judges

Order of submission

Ordered appeal in above cause argued by Mr. James E. Kelby, counsel for appellants, and by Miss Esther B. Phillips, Assistant United States Attorney, counsel for appellee, and submitted to the Court for consideration and decision.

Excerpt from Proceedings of Thursday, October 22, 1936

Before DENMAN, MATHEWS, and HANEY, Circuit Judges

Order directing filing of opinions and filing and recording of decree

By direction of the court, ordered that opinion and dissenting opinion this day handed the clerk of this court in above cause be forthwith filed by the clerk, and a decree be filed and entered in the minutes of this court in accordance with the majority opinion rendered.

(CLERK'S NOTE.—The opinions of the court which follow are the opinions rendered Oct. 22, 1936, as amended by order of June 7, 1937.)

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 7522. June 7, 1937

JAMES E. O'DONNELL, ET AL., APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Before DENMAN, MATHEWS, and HANEY, Circuit Judges

DENMAN, *Circuit Judge:* This case began in a bill filed by the United States for the cancellation of two patents granting certain swamp and overflowed lands in the State of California to that state, the patent from that state to one Darlington, and the successor deeds thereto, and for the quieting of the title of the United States against the successors in interest to California in the patented lands. The lands are a part of Mare Island, northwesterly of the main plant of the Mare Island Navy Yard. The District Court held for the United States, and this appeal followed.

Preceding the reasoning and extended consideration of the authorities of this opinion is a brief chronological statement of the facts and successive issues presented and our holding in each.

The United States asserts it has deraigned title from one Castro, claimed grantee from the Mexican government. Also, if the Castro title is not valid, it claims title by virtue of reservations of the land for naval purposes, made after the lands were ceded to the United States by the Treaty of Guadalupe Hidalgo. Appellants, deraigning the title from the State of California, claim Castro had not title and that the lands were granted by Congress to California prior to the attempted naval reservations.

The government asserts that the evidence shows that in 1840 one Jose Victor Castro, a Mexican citizen, petitioned the then Governor of California, one Alvarado, for a grant of Mare Island, including the swamp and overflowed lands here in controversy. The acting Governor Jimeno gave Castro a provisional permit to occupy Mare Island, and on May 2, 1841, Governor Alvarado executed an instrument purporting to grant to Castro, Mare Island, including the land in question. No evidence of the recordation or filing of the grant in the archives of the Mexican government was offered.

We hold this evidence not available to the government because in the proceeding before the Board of Land Commissioners, hereafter discussed, in which the evidence was produced, the United States violated a trust relationship to the State of California with reference to these lands, or, alternatively, because California was a third party to the proceeding in which the evidence appears, both of which contentions are more fully considered hereafter.

We hold further under Berreyesa v. U. S., 154 U. S. 628, and other cases later cited, that even were these facts proved, they show no title in Castro because of the lack of filing or recordation of the grant in the Mexican archives.

On July 4, 1848, California was ceded to the United States by the Treaty of Guadalupe Hidalgo. We hold this treaty transferred the lands in dispute to the United States.

On September 28, 1850, by an Act of Congress, 9 Stats. 519, the United States granted to California whatever title it had to the swamp and overflowed lands here in question.[1]

The brief of the United States concedes "that the lands in controversy were swamp and overflowed in physical character and would have been swamp and overflowed lands under the Act of September 28, 1850", if they were public lands of the United States on that date.

The patents sought to be cancelled are for a part of these swamp and overflowed lands so granted to California. In this proceeding the patents establish the status of California and its successors in interest as present owners of the legal title. They further establish that California was granted, in praesenti, in 1850, the full equitable interest by the Congressional Act of that year, the United States reserving the bare legal title. This status, established by the patents, is the given quantity in the legal problem here involved. To overcome it, the government has upon it the extraordinary burden of proof necessary to defeat the title and rights established by such a solemn instrument.

On November 6, 1850, five weeks after the grant to California, President Fillmore made an attempt, formally perfect, to reserve Mare Island, including the swamp and overflowed lands, "from sale." On February 11, 1853, he again made an attempt, formally perfect, to make of Mare Island and these swamp and overflowed lands a "reservation of public lands" authorized under an act of Congress of August 31, 1852.

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[1] "That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State. [Underscoring supplied.]

"§2. And be it further enacted, That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: Provided, however, That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of levees and drains aforesaid.

"§3. And be it further enacted, That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is 'wet and unfit for cultivation', shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

"§4. And be it further enacted, That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known as designated as aforesaid, may be situated." [Boldface supplied].

9 Stat. 519.

We hold that because of the prior grant to that State, neither reservation was effective to divest California's then full equitable interest in the lands in dispute.

On March 3, 1851 (9 Stats. 631, ch. 41), Congress created a commission of three commissioners "for the purpose of ascertaining and settling private land claims in the State of California." This act provided that anyone claiming title to lands in California derived from a Spanish or Mexican grant, must within two years present his claim to the commission which must render a decision on the validity of the claim. § 9 provided for a review of such decision by the District Court, and § 10 provided for an appeal to the Supreme Court. With respect to all lands, the claims to which were not presented to the commission within the two year period, such lands were to be considered as a part of the public domain.

§ 15 provided that the final *decrees* rendered, or any patent issued under the act "shall be conclusive *between the United States and the said claimants only, and shall not affect the interests of third persons.*" [Italics supplied.]

The act provided for service by the claimant on the United States and for its defense against the validity of the claimed Mexican titles. If there were such a defense it was the duty of the United States attorney to seek a "final decree" in its favor which "shall be conclusive between the United States and said claimants."

On August 31, 1852, the Castro claim was presented to the Land Commission by Bissell and Aspinwall, to whom it had come by mesne conveyances.

On January 4, 1853, the United States purchased the interest of the claimants Bissel land Aspinwall in the Castro claim to Marc Island, thereby merging in the United States the interests of both parties to the controversy. The deed declared the purpose of the purchase to be to carry out the provisions of an act of Congress to devote the property to the use of a United States Navy Yard.

We hold that by this transaction the United States sought to acquire the Castro title for its own use, and adverse to the use and interest of the State of California, its cestui que trust.

On Ocober 10, 1854, and after it had acquired whatever title Castro had, the United States for the first time appeared in the Land Commission proceeding in the taking of a deposition. Without advising the Commission of its personal proprietary interest in the Castro title, it proceeded to conduct a pretended controversy with Bissell and Aspinwall. Further depositions were taken and witnesses examined by both parties in this sham proceeding.

The United States contends that California was not a "third person" alien to this controversy within the meaning of the statute creating the commission, but contends that California and appellants here "are remote claimants under successors to, and in privity with, the United States of America"; and hence the decree in favor of the Castro title is a decree also against California and appellants, and they "are bound by said decree." This although at all times after its

appearance it was to the proprietary interest of the United States to establish that the Mexican government granted the lands in controversy to Castro and therefore that they were not ceded to the United States by the Treaty of Guadalupe Hidalgo.

Such action of the United States was at all times adverse to California, its cestui que trust to which, in the absence of a grant to Castro, the lands were granted by the United States in 1850.

On May 8, 1855, the Land Commission gave its decree against the United States, and confirming to Bissell and Aspinwall the Castro title, which they no longer owned.

On February 18, 1856, the United States filed its petition for review in the District Court, where, under the act, it was entitled to a trial de novo. The petition alleged that the Castro "claim is invalid." On the same day, Bissell and Aspinwall, who over three years before had transferred the title to the United States appeared and answered the petition, alleging "their" title "to Mare Island" "is a good and valid title" and praying an affirmance of the decree of the Land Commission.

Of date March 2, 1857, a decree affirming the decision of the Land Board, prepared for the judge, appears in the record. It was never signed. The case rested in this condition for 73 years. Appellants suggest that the reasons for this long non-action by the United States were the opinions of Attorney General Caleb Cushing, of date April 9 and October 12, 1853, later considered. These opinions were given after the United States had acquired the Castro claim, but before any testimony was taken before the Land Board. They declare that a pretended defense against the Castro claim "probably could not affect any adverse claimant" and that California "may set up, and probably maintain, title as against the United States, as to so much of Mare Island" as constitutes "uncultivatible overswamped land within its limits."

On March 18, 1857, about a fortnight after the date of the unsigned decree, the State of California gave to one David Darlington its patent to the Mare Island swamp and overflowed lands, identified as those in Survey No. 34, the lands in dispute. In the present suit the United States seeks also the cancellation of the Darlington patent from California, and of all intervening conveyances to and including those to appellants.

From March 18, 1857, Darlington and his successors in interest have persistently and in good faith maintained that they have held all the title to these lands which was granted to California in 1850.

Some time prior to March 6, 1928, a mandamus proceeding was brought on the relation of appellant O'Donnell against Hubert Work, then Secretary of the Interior, in the Supreme Court of the District of Columbia, to compel the Secretary to issue the patent of the United States to appellant O'Donnell and others for the lands in Survey No. 34. Proceedings therein were duly had and a peremptory writ issued to the Secretary to issue the patent. Appeal was taken

to the Court of Appeals of the District of Columbia where the issue of the writ was affirmed. Certiorari was not sought by the Secretary.

We hold that as to the decision against the Secretary it is res judicata as to the character of the lands in question as swamp and overflowed lands to which California, if it had been granted them by the Act of 1850, was entitled to patent by virtue of this identification by Survey No. 34 filed with the Secretary.

On April 15, 1930, in the District Court, the case of U. S. v. Bissell and Aspinwall was reopened, and a decree nunc pro tunc of March 2, 1857, was ordered in favor of Bissell and Aspinwall. The decree recites both the acquisition of their title by the United States and that the order directing a decree establishing the Castro title was "by consent of the United States District Attorney."

Neither the State of California, then holding the United States patent, nor any of its successors in interest appeared or were made parties to this action, and no notice of any kind given them. So far as California and its successors are cestuis que trust of the United States, the decree of April 15, 1930, was secretly obtained. Nevertheless the decree purports to be binding upon them, holding:

"* * * that all the right, title, and interest of the Appellees herein in and to the said claim, have passed to and have been acquired by the United States, the Appellant herein, by purchase from the said Appellees, and that all persons [California and its successors] *claiming by, under, or through the Appellants* [the United States] or the Appellees or any of them, are *chargeable with notice of this action* and of everything that has been done therein, and therefore, *that no rights of third persons have intervened or could intervene.*" [Italics supplied.]

We hold that California and appellants are not bound by the decree or anything done in the Bissell and Aspinwall case, whether they be regarded as cestuis que trust, claiming, as asserted in the decree, under the United States, which thus sought and procured a decision adverse to their interest, or as "third persons" alien to the litigation within the meaning of the act creating the Land Commission.

We further hold, sitting in this equitable proceeding, that, as in any such case, appellants may show by any evidence, whether within or dehors the Bissell and Aspinwall record, the adverse interest of the United States, as trustee, to that of its cestuis, California and appellants. They may thereby defeat the United States' assertion that, because they hold their equitable interest by grant of the United States, they are bound by the decree, by showing that such a contention cannot be maintained with clean hands. Michaels v. Post, 21 Wall. 398, 426.

We also hold that the decree is not binding upon appellants because it was given in a non-adversary action in which the claimant and defendant were one, and hence no justiciable issue existed upon which adjudication could be had.

The United States also contends, though not pressing it with vigor, that by the Treaty of Guadalupe Hidalgo there was a withdrawal of the swamp and overflowed lands in question because of the pendency of the invalid Castro claim. Such a withdrawal would remove the claimed area from the "public lands" category, and hence it would not pass to California by virtue of the grant of 1850.

We hold there was no such withdrawal.

I. The patents to California determine the satisfaction by the patentee of the requirements of the granting Act of 1850 as to identifying the land by surveys as swamp and overflowed land, of which the United States conveyed whatever title it had in 1850.

The patents sought to be declared void were given by the Secretary of the Interior to California under the compulsion of a mandate in a proceeding brought by the successors to the state title in the Supreme Court of the District of Columbia, in which litigation the Court of Appeals finally determined that the writ should issue. Work, etc., v. U. S. et rel O'Donnell, 23 Fed. (2) 136.

The authorities we discuss infra show that the above admission of the United States as to the swamp and overflowed character of the lands described in the patent is an admission that the Act of 1850 granted to California at least a full equitable and indefeasible interest in whatever property the United States then had in them. We take it that the United States is not seeking to cancel the patents because of a mere failure of the Secretary in some ministerial duty regarding the approval of one or another survey in his files—that is to say, invoking this court, sitting in equity, to avoid temporarily what ultimately must be done.

The compulsion of the mandate in the proceeding against the Secretary of the Interior required him merely to exercise his ministerial discretion. It did not prescribe the method of its exercise. In response to the writ he exercised it with reference to a survey in his files, called Survey No. 34, upon which the descriptions in the patent are based. His return shows the exercise of that discretion on January 10, 1925, in the following language:

"From the evidence before me I am led to the conclusion that the body or strip of land known as Survey No. 34, was, at the date of the swamp-land grant of September 28, 1850, swamp in character, * * * Accordingly, it is hereby declared to be swamp land, and, as such, subject to patent to the State of California in the absence of other sufficient reasons." Plf. Ex. J., p. 45.

Work v. U. S., 23 Fed. (2) 136.

Upon this approval of Survey No. 34, so evidenced in the Secretary's return, the writ of mandate was issued for the execution of the assailed patents. The Secretary's determination with regard to the survey and character of the land is conclusive and may not be collaterally attacked. Cragin v. Powell, 128 U. S. 691, 699; Knight v. U. S. Land Asso., 142 U. S. 161, 176; Rogers Locomotive Works v. Emigrant Co., 164 U. S. 559, 571; Gauthier v. Morrison, 232 U. S. 452, 460.

The patent reverts back to the date of the grant of 1850, and conveys, as of that date, whatever legal title it then had, thus completing in law whatever had been granted in equity. French v. Fyan, 93 U. S. 169, 170, considered infra.

The United States nevertheless is entitled to seek to cancel the patent on grounds that it had no title to the lands, or that before the patentees' interest had become vested, in equity or at law, the lands had been reserved to a public use. U. S. v. Schurz, 102 U. S. 378, 396, 404.

II. The heavy burden of proof on the United States in seeking to cancel its patents.

In seeking to have declared void a patent from the United States, which by reverting to September 28, 1850, evidences a then grant of full legal title to the lands, the United States has a more than ordinary burden of proof. To avoid such "solemn evidences of title emanating from the Government of the United States under its official seal" requires the observance of the rule that it "cannot be done upon a bare preponderance of evidence which leaves the issue in doubt" even more than in suits between private parties for such cancellations. Only "that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful." U. S. v. Maxwell Land Grant Co., 121 U. S. 325, 381, 382. This language was quoted and reaffirmed in U. S. v. Stinson, 197 U. S. 200, 204, 205. Also in Wright-Blodgett Co. v. U. S. 236 U. S. 397, 402, 403.

As stated, the patent, until overcome by such evidence, establishes the fee to the land in the appellants. As later shown, it also establishes the status of California as the cestui que trust of the United States, holding the full equitable title by virtue of the Congressional grant of 1850; the United States, as trustee, holding the bare legal title. This is the given quantity, to displace which this heavy burden rests on the United States.

We will now consider the claim of the United States that it has shown the validity of the Castro title by evidence in the instant case, as distinguished from its claim, later considered, that its validity is established by the decree in the Bissell and Aspinwall case.

III. Assuming that the Castro title could be established against the patents by new evidence in the instant case, commenced more than 65 years after the expiration of the time to file claims before the Land Board, its validity is not sustained here, because

(a) The paper writing purporting to be a certified copy of a writing in Spanish, in words of a Mexican grant to Castro, recorded in a county other than that of the location of the land, with no showing of execution of an original, and without acknowledgment, is not admissible under the California law, even though unsuccessful search for an original has been proved;

(b) Even if execution of some grant to Castro had been shown and the alleged copy offered in the course of proving the contents of an ancient document, it was not admissible because no proper

search for the original was made. Herein of the decision in the Bouldin v. Phelps case that the Castro grant was fraudulent and void certain ethical considerations relative to the conduct of the United States here seeking equity;

(c) Even if the execution by the Mexican government of a document in words of a grant to Castro had been shown, he did not acquire title, because the duplicate was not shown to have been filed in the Mexican archives;

(d) There is no evidence of even a possessory right in or possession by Castro.

Underlying all the government's several attacks on the patents to California, is its claim that one Castro, in 1841, was granted the swamp and overflowed lands by the Mexican government, which lands the United States acquired by mesne conveyance in 1853, that is after the grant to California in 1850. If this contention be correct, the United States did not acquire these lands from Mexico in the cession of area now constituting the State of California, and hence they were not granted to California by the Act of 1850.

(e) The paper writing purporting to be a certified copy of a writing in Spanish, in words of a Mexican grant to Castro, recorded in a county other than that of the location of the land, with no showing of execution of an original, and without acknowledgment, is not admissible under the California law, even though unsuccessful search for an original has been proved.

Aside from the record in Bissell and Aspinwall *v.* United States, which we hold, infra, cannot be considered against the California title, there is nothing in the transcript of the record of the trial below relating to a grant by the Mexican authorities of the lands here in question, to which the United States claimed to have deraigned title, but a copy of an unacknowledged, unsealed, and uncertified document in Spanish, shown only to have been copied on July 28, 1852, in the Book of Deeds in the office of the Recorder of Sonoma County, California. The bill alleges, and it is admitted, that Mare Island is in the county of Solano, not Sonoma, the place of the claimed recordation. Nor was it in Sonoma County on July 28, 1852.

By the Act of May 3, 1852 (Cal. Stats, 1852, p. 236), the boundaries of Sonoma County were so changed as to exclude Mare Island from that county. This Act under the California Constitution as it then stood went into effect on the date of its approval, that is May 3, 1852, over two months before the recordation. People *v.* Clark (1851), 1 Cal. 406.

That a certified copy of a document which is recorded in a county other than that where the land lies is not admissible under the statutes permitting the introduction of a copy of recorded instruments, is established by all the authorities. It will suffice to refer to Virginia, etc., Coal Co. *v.* Charles (1917), 251 Fed. 83, 102; 22 C. J., p. 883, § 967, and cases there cited.

The translation of the document shows the words of a grant from a former Governor, one Alvarado, to one Victor Castro. It purported to have been dated May 2, 1841. No original document was offered by the government.

Appellants below moved to strike it from the record, on the ground that such a document had no evidentiary value, citing Wilson v. Corbier, 18 Cal. 166. No contrary authority has been cited by the government and in brief and argument it offers no opposition to the contention.

The holding of the California Supreme Court that such a document acquires no evidentiary value under California's provisions for recordation (Cal. Stats. 1851, p. 199), and that it is not admissible as evidence of title, is clear. The report states the issue as follows:

"Ejectment for a tract of land, being a part of the Jimeno Grant, in Colusa County. Plaintiff, in deraigning title from Jimeno, offered and read in evidence a copy of the grant, with translation attached. Next, he offered a book from the Recorder's office of Colusa County, and asked to read therefrom what purported to be a copy, *in the Spanish language*, of a deed from Jimeno to Larkin and Missroom, executed in 1847. To the introduction of which defendants objected, on various grounds, but mainly that the deed, as recorded in said book, purported to be a copy; that there was no proof of the execution of an original, and that the *original did not appear to have been properly acknowledged, or proved and certified. Plaintiff then proved that he had made search for the original deed, without success.* The court ruled out the deed, and plaintiff excepted." [Italics supplied.]

Wilson v. Corbier, supra, 166.

The court held as follows:

"The plaintiff failed to deraign title. The deed from Jimeno to Larkin and Missroon was not proven. The deed was executed in 1847 and made a record in the office of Colton, Alcalde of Monterey. A copy in the Spanish language appears to be on the records of Colusa County. But we know no law which authorized the Recorder or Clerk of Colusa to record this copy so as to make it evidence, without further proof."

Wilson v. Corbier, supra, 167.

The document should have been excluded, for even had there been a proper search the copy was not admissible under the California law, which controls the admission of evidence in suits in the Federal courts involving title to California lands.

In Olcott v. Bynum (1873), 84 U. S. 44, the matter under consideration was a land title in North Carolina, and the question was as to the admissibility in evidence of a certified copy of a deed improperly recorded. As to this question, the Supreme Court said:

"It is one to be determined by the lex loci rei sitae. It is to be considered solely in the light of the statutes and adjudications of North Carolina. This court must hold and administer to the law upon the subject as if it were sitting as a local court of that state."

Olcott v. Bynum, supra, 57.

This, of course, is nothing more than a particular application of the general rule that in matters pertaining to real property the law of the situs governs.

In view of our holding, infra, that the record in Bissell and Aspinwall v. United States is not competent evidence against appellants deraigning the California title, the record here is bare of any evidence that prior to the Treaty of Guadalupe Hidalgo, Mexico, ever did anything to divest itself of its title to the lands in question. They therefore became public lands of the United States upon the cession to the United States by that Treaty.

(b) Even if execution of some grant to Castro had been shown and the alleged copy offered in the course of proving the contents of an ancient document, it was not admissible, because no proper search for the original was made. Herein of the decision in Bouldin v. Phelps that the Castro grant was fraudulent and void and certain pertinent ethical considerations relative to the conduct of the United States here seeking equity.

It should be noted, in this equitable proceeding, that the Castro deed became an ancient document because of the passage of time during the government's delay of seventy-seven years in prosecuting its unified non-adversary claimant-defendant appeal in the District Court. That is from 1857 to 1930, when, after over sixty years' delay before the Interior Department, and, finally, by pressure of mandate from the District Court of the District of Columbia, the United States in 1928 was compelled to recognize the 1855 Survey Number 34 and grant its patent for the lands so surveyed, and then, for use in cancelling its patent, caused the nunc pro tunc decree to be entered in the case in the California District Court. This should be considered in connection with the further claim of the government that by delaying for seventy-three years in taking its decree, really in favor of itself, it kept Mare Island subjudice, and hence not subject to patent, while it retained its use for its Navy Yard. Also it warrants its consideration in connection with the contention, considered infra, that the United States, as trustee, can conduct a proceeding against a faked opponent, though really against itself, and then claim the benefit of the judgment as adverse to its cestui.

We pass these considerations for the purpose of fully exploring the government's claims.

Assuming that there had been proof of the execution of some kind of document to Castro, and that the claimed anciency of the copy of the writing in Spanish is available to prove the contents of an original grant, all the authorities are agreed that a thorough search for the original must be made. No such search was proved to have been made by the government in this case.

In this connection it must be remembered that under the Mexican law there are two documents containing the words of a grant of land from that government. One is the original, held by the grantee, and the other is the copy which must be deposited in the Mexican

archives. The document sought to be proved is the claimed original, once in the possession of Castro, as grantee. Proper search for this document would require, first, inquiry of Castro himself, who is not shown not to be alive; if, as is likely, he is dead, then of his representatives and heirs; failing there, search among those to whom the document might have passed as a muniment of title, including Bissell and Aspinwall, and their heirs, or the successors to their papers and documents; and, finally, in the archives of the United States itself, the claimant seeking to avail itself of this title against its cestui. There is no evidence of any such search.

There is evidence of a search, more than sixty-five years after the appeal of the Bissell and Aspinwall suit to the District Court. This search was of the Mexican archives and of the records of the Land Commission in the office of the Surveyor General for California, who, it is claimed, became their successor custodian. With regard to the search of the Mexican archives, it is obvious that this is meaningless so far as concerns the original document, if any, given to Castro. That document has no reason to be in the Mexican archives.

So far as concerns the records of the Land Commission, we hold, infra, that the United States cannot avail itself of the transcripts of the evidence taken adverse to California in the Bissell and Aspinwall proceeding. There is, therefore, no evidence that the claimed lost document ever came into the possession of the Land Commission or became a part of its records. There is, therefore, no relevancy to evidence of a search of those records.

However, it appears that the government was charged with knowledge of the record in Bouldin v. Phelps (1887), 30 Fed. 547, in which the same court from which comes this appeal found that the claimed original Castro grant was given to it in evidence and was there held to be a fraudulent document, actually executed after Governor Alvarado had ceased to be Governor and after California had ceased to be Mexican territory.

In this proceeding in equity the District Court in the trial below should have had called to its attention the record in Bouldin v. Phelps, supra, which shows the existence of a controversy over the same document that is here relied on, and the presence of that document in that record in 1887, some thirty years after the hearing before the Land Commission, concerning the title in question here. The record in the same court, involving the same Mexican title, that court properly could consider under the decisions of

Lockhard v. Johnson, 181 U. S. 516, 520;

Criscuolo v. Atlas Imp. Diesel Eng. Co. (CCA-9), 84 Fed. (2) 273, 275;

National Fire Ins. Co. v. Thompson, 281 U. S. 331, 336.

We pursue the consideration of the conduct of the United States in this case under the criterion laid down by Justice Miller. That criterion is that the evidence offered to cancel a patent of the United States must be evidence that "commands respect", U. S. v. Maxwell Land Grant Co., 121 U. S. 325, 381, 382. We have seen the holding

f the obvious by the Supreme Court that the United States is bound o the bona fides towards its adverse citizen litigant, at least as great s that of private persons.

It is, therefore, pertinent to note that the Court below had, in its ecords, the case of Bouldin v. Phelps, involving the same grant to Castro; that in that case the United States District Attorney, appearing for the Commandant in charge of Mare Island, and an Attorney, appearing separately for the United States itself, there ought to prove, and succeeded in proving, that the Castro claim ould not defeat the title of the United States acquired by the cession f the Treaty of Guadalupe Hidalgo, because the alleged grant was raudulently executed. Bouldin v. Phelps, supra.

Entirely apart from the question of ethics involved is that of the ffect of this purposeful shift of position as to the validity of the Castro grant, within the judicial knowledge of the court below, on he right of the government, in a court of equity, to attempt to justify a search of the record in the Bissell and Aspinwall case, for the riginal Castro grant, as the place where last seen, when it knew it vas not last seen there.

We hold that no search has been made to justify the proof of the Castro grant as an ancient document.

(c) Even if the execution by the Mexican government of a document in words of a grant to Castro had been shown, he did not cquire title, because the duplicate was not shown to have been filed n the Mexican archives.

Even if we were to consider the testimony in the Bissell and Aspinwall case, it shows no grant to Castro. The Supreme Court has repeatedly held that the Republic of Mexico has not granted ands in the territory ultimately ceded to the United States unless t appears that the "grant from the Mexican government had been deposited and recorded in the proper public office among the public rchives of the republic.'" Berreyesa v. U. S., 154 U. S. 623.

That decision cites and relies on the following cases: U. S. v. Cambuston, 20 How. 64; U. S. v. Castro, 24 How. 349; U. S. v. Knight's Adm., 1 Black 251; Peralta v. U. S., 3 Wall. 440. All of these sustain he proposition there laid down.

If we were to seek a reason for the requirement that the grant arose rom the deposit and recordation, it is suggested by the finding, in the Bouldin case, supra, of fraud in the execution of the Castro grant by the Mexican Governor, after he had ceased to occupy the office. There are many reported cases in the federal courts upon similar charges of fraud.

Nowhere in the record of the Bissell case is it shown that there vas any deposit or recordation in the public archives of the Republic of Mexico of the claimed grant to Castro. Not only is there a failure o show a deposit in the Mexican archives, but Governor Alvarado, who claimed to have executed a grant to Castro, testified:

"Q. Was there any record of said grant kept in the archives?

"A. I do not remember.

"Q. Was it usual to keep a record of such grants?

"A. There was a book in which an entry was made of such grants generally though the Secretary might forget it.

* * * * * * *

"Q. Why did you not *as was your usual custom first make a decree annexed to the Expedient and then make the grant on a separate piece of paper?*

"A. Because. I was sufficiently well satisfied with what I did." [Italics supplied.]

The espediente is the recordation of the successive steps in the acquisition of title of California lands under the then prevailing Mexican law. The Supreme Court in the case of U. S. v. Knight's Adm., 66 U. S. 227, 245, 246, has described the documents necessary for recordation made in the espediente, as follows:

"These several papers—that is, the petition, with the diseno annexed, the order of reference, the informe, the decree of concession, *and the copy of the grant*, appended together in the order mentioned—constitute a complete espediente, within the meaning of the Mexican law." [Italics supplied.]

In the record before the Board of Land Commissioners appears a full transcript of the espediente as claimed by the government. It contains the petition, the order of reference, and the informe. It does not contain either the original, a duplicate, or a copy of the grant to Castro. If it were admissible, it would defeat the government's contention.

(d) There is no evidence or even a possessory right in or possession by Castro.

The government claims that the Castro claim was confirmable upon the basis of the incomplete espediente plus possession. It does not claim, and cannot claim, that mere possession in the absence of some showing upon which to base a grant warrants a confirmation of title. U. S. v. Serrano, (1867) 72 U. S. 451; Miller v. Dale, (1876) 92 U. S. 473; Romero v. U. S., (1864) 68 U. S. 721.

The only evidence upon which the claim of possession even colorably could be asserted is in the depositions before the Land Commission, taken after the United States had acquired whatever Castro claimed to have owned. The record containing these depositions we hold, infra, cannot be considered in evidence here, and, therefore, we hold that the government has not established any right in Castro based upon possession.

Even if we were to consider this evidence, it does not show that Castro's occupation of the Island, such as it was, was exclusive. It is entirely silent on this point. After putting horses on the Island, Castro went away with his brother; he did not live on the Island; he did not cultivate it; he did not make a home there; he merely pastured a few horses in the care of Indian caretakers. As to the swamp and overflowed portion of Mare Island as distinguished from its upland, it is a fair inference that the horses were pastured on the 700 to 800 acres of upland and not in the swamp.

That this is not a sufficient showing of possession to satisfy the standards established by the Federal decisions is apparent from U. S. v. Teschmaker, (1860) 63 U. S. 392, 402 to 404; U. S. v. Vallejo, (1860) 63 U. S. 416; Whitney v. U. S., (1897) 167 U. S. 529, 546; Bergere v. U. S., (1897) 168 U. S. 66, 79–80; U. S. v. Polack, (1857) 27 Fed. Cas. #16061, 580, 584–5; U. S. v. De Haro, (1862) 25 Fed. Cas. #14939, 805, 807–8.

Furthermore, the claimed Castro grant is of a certain place by name and without the mention or description of the boundaries. Hence, even if the horses and the Indians indicated possession of some part of Mare Island, the occupancy of the swamp land described by Survey Number 34 must be specifically shown. Nothing of the kind is shown by the depositions in the case before the Land Commission, even if they were admissible. The leading case establishing this rule is.

Higuera's Heirs v. U. S. (1865), 72 U. S. 827, 833–4. In that case the Supreme Court of the United States said:

"Concessions or grants of land by Mexican governors were of three kinds, and in some respects the rules applicable to their construction are widely different. They were concessions or grants by specific boundaries, where, of course, the donee is entitled to the entire tract of concession, or grants by quantity, as of one or more leagues of land situate at some designated place, or within a larger tract described by what are called out-boundaries; where the donee is entitled to the quantity specified and no more, *or grants or concessions of a certain place or rancho by some particular name, either with or without specific boundaries; where the donee is entitled to the tract according to the boundaries, if boundaries are given, and if not, according to the extent and limits of the tract or rancho as shown by the proofs of settlement and possession.*" [Italics supplied.]

This rule has found repeated expression in the later decisions of the United States Supreme Court. See, as illustrative:

Alviso v. U. S. (1869), 75 U. S. 337, 339;

Williams v. U. S. (1876), 92 U. S. 457;

U. S. v. McLaughlin (1888), 127 U. S. 428, 448.

Not only has this rule been frequently stated (and, so far as we have been able to find, without any dissent whatsoever), but it has also been applied in a number of instances. Thus, in the Alviso case the grant under consideration was of a place known as "Milpitas", as to which the Supreme Court said: (340)

"It is also a grant of a certain place by name and *as the boundaries are not given, its extent and limits must be shown by the settlement and possession of the grantee.*" [Italics supplied.]

The court went on to consider this question and, in view of conflicting evidence, upheld the judgment of the court below approving the third survey of the tract.

See also U. S. v. Chaboya (1862), 25 Fed. Cas. #14769, 871.

We therefore hold that, insofar as concerns any direct evidence of the claimed grant to Castro, offered in the instant case, there is none. We therefore proceed to the consideration of the effect on the patents of the suit and decree of the District Court in United States v. Bissell and Aspinwall.

IV. The grant to California by the Act of 1850 was a grant in praesenti. It transferred to California the entire equitable interest in the lands, the United States thereafter holding the bare legal title. It removed the swamp and overflow area from the "public lands." Thereafter they were no longer lands from which could be made a Presidential reservation "from sale" or "of public lands."

On November 6, 1850, six weeks after the grant to California, President Fillmore attempted to make a reservation of Mare Island "from sale", as follows:

"The President of the United States *exempts and reserves from sale*, for public purposes, the following tracts or parcels of land in the State of California:

* * * * * * *

"On the eastern side of the Bay of San Pablo.

"6th. Mare Island.

"7th. The land on the eastern side of Mare Island Straits, beginning at the high hills between those Straits and the City of Benecia, about 2,000 to 2,500 yards from the former, and extending in a line nearly parallel to it, to a point opposite the northern extremity of Mare Island, and thence to the Straits so as to join them at a point about 800 yards north of the northermost high hills on the eastern side of the Straits." [Italics supplied.]

On February 11, 1853, a second reservation was made. This reservation was confined by the express provision of the congressional act of August 31, 1852, to a "reservation of public lands", the act providing that the Secretary of the Navy is

"* * * authorized and directed to select a site for a Navy Yard and Naval Depot in the Bay of San Francisco, in California, or neighboring waters, either by *purchase* or reservation of *Public Lands*, as the case may be, * * *." [Italics supplied.]

It will be noted that neither the reservation "from sale" nor of "Public Lands" purports to be or is an exercise of eminent domain, by which the United States sought to deprive California of her interest in the lands. The act expressly provides for "purchase" of any outstanding interest. It is immaterial under the act whether the outstanding interest be in California or in one holding by Mexican grant prior to the Treaty of Guadalupe Hidalgo. On April 2, 1853, the Secretary of the Navy requested the Attorney General's opinion as to whether under the provisions of the Act of March 3, 1853, the Funds appropriated therein may legally be expended for certain objects of construction at Mare Island. This Act appropriated the sum of $100,000 for such purpose with the provision "that before this sum shall be expended, the Attorney General of the United States shall

decide that the United States have good title to the land upon which buildings are to be erected."

Attorney General Cushing in his reply of the same date stated:

"I recommend therefor as indispensable prerequisites to any lawful expenditure of public money on Mare Island—

"First, that due investigation be had, through the District Attorney of the Northern District of California, or otherwise, into the claim of Henry Sanford, and any other ground of individual claim of date *subsequent to the conquest.*

"Secondly, that the State of California be invited to relinquish to the United States whatever claim, if any, she may have to the shores or the *overflowed* land of Mare Island." [Italics supplied.]

Congress in passing the act must have had the same view as to California's title as the Attorney General. California never relinquished the swamp and overflowed lands in the patents here attacked, though it did certain lands to the eastward of those in the patents.

The purported reservation of 1853 comprised:

"* * * that the tract of land in the Bay of San Francisco bounded by the Bay of San Pablo, the Straits of Carquines and Napa Creek, known as Mare Island, *together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island*, and the harbors, waters, and anchorages connected therewith and necessary to the use of the same, be reserved to the United States for public uses." [Italics supplied.]

The question of the power of Congress to divest a state to which it granted swamp and overflowed lands by the 1850 act early came before the Supreme Court. In the case of French v. Fyan, 93 U. S. 169, Congress, by that act, had granted the lands in question to Missouri. Later, in 1857, as here to California, a patent was issued to the State of Missouri. In the interim, under a congressional grant of 1852, the swamp and overflowed lands were certified in 1854 to the Missouri Pacific Railway Company. If it constituted a reservation at all, this certification of the lands by the Secretary of the Interior to the Railway under the Act of Congress of 1852 was as complete a reservation of the swamp and overflowed lands "from sale" and from the "Public Lands" as was the withdrawal of swamp and overflowed lands in dispute under the act of August 1852.

The Supreme Court held that the withdrawal by certification of the lands to the Railway under the act of 1852 could not divest Missouri of its title to the swamp and overflowed lands granted in 1850, since the earlier act was a grant in praesenti to that state:

"This court has decided more than once that the swamp-land act was a grant in praesenti, by which the title to those lands passed at once to the State in which they lay, except as to States admitted to the Union after its passage. The patent, therefore, which is the evidence that the lands contained in it had been identified as swamp-lands under that act, relates back and gives certainty to the title of the date of the grant. As that act was passed two years prior to

the act granting lands to the State of Missouri, for the benefit of the railroad, the defendant had the better title on the face of the papers, notwithstanding the certificate to the railroad company for the same land was issued three years before the patent to the State, under the act of 1850. For while the title under the swamp-land act, being a present grant, takes effect as of the date of that act, or of the admission of the State into the Union, when this occurred afterwards, there can be no claim of an earlier date than that of the act of 1852, two years later, for the inception of the title of the railroad company."

French v. Fyan, 93 U. S. 169, 170.

In many succeeding cases the Supreme Court has reaffirmed this decision that the grant of 1850 was such a present grant.

The principal established in French v. Fyan has recently been reaffirmed by the Supreme Court in U. S. v. Minnesota, 270 U. S. 181, where the cases and decision of the Secretaries of the Interior are reviewed:

"By the act of September 28, 1850, Congress granted to the several States the whole of the swamp lands therein then remaining unsold, c. 84, 9 Stat. 519. The first section was in the usual terms of a grant *in praesenti*, its words being that the land described 'shall be, and the same are hereby, granted.' The second section charged the Secretary of the Interior with the duty of making out and transmitting to the governor of the State accurate lists and plats of the lands described, and of causing patents to issue at the governer's request; and it then declared that on the issue of the patent the fee simple to the lands should vest in the State. The third section directed that, in making out the lists and plats, all legal subdivisions the greater part of which was wet and unfit for cultivation should be included, but where the greater part was not of that character the whole should be excluded. The question soon arose whether, in view of the terms of the first and second sections, the grant was *in praesenti* and took effect on the date of the Act, or rested in promise until the issue of the patent and took effect then. The then Secretary of the Interior, Mr. Stuart, concluded that the grant was *in praesenti* in the sense that the State became immediately invested with an inchoate title which would become perfect, as of the date of the Act, when the land was identified and the patent issued, 1 Lester's Land Laws, 549. ["As the grants are regarded as taking effect from the date of the laws making them respectively, and as *vesting the inchoate title in the states*, it follows that any subsequent *sale or location of swamp and overflowed lands must be held to be illegal* and the purchase money refunded, or a change of location ordered." 1 Lester's Land Laws.] That conclusion was accepted by his successors, was approved by the Attorney General, 9 Op. 253 ["This difficulty, therefore, is solved if the mere grant [of 1850], as you call it, gave the State a right to the land from the day of its date. That it did so there can be no doubt. In an opinion which I sent you on the 7th of June, 1857, concerning one of the same laws now under consideration, I said that a grant

by Congress does of itself *proprio vigore, pass to the grantee all the estate which the United States* had in the subject matter of the grant, except what is expressly excepted." * * * 9 Opinions Attorneys General, 253], was adopted by the courts of last resort in the States affected, and was sustained by this Court in many cases. French v. Fyan, 93 U. S. 169, 170; Wright v. Roseberry, 121 U. S. 488, 500, et seq.; Rogers Locomotive Works v. Emigrant Co., 164 U. S. 559, 570; Work v. Louisiana, 269 U. S. 250. A case of special interest here is Rice v. Sioux City & St. Paul R. R. Co., 110 U. S. 695. The question there was whether the Act of 1850 operated, when Minnesota became a State in 1858, to grant to her the swamp lands therein. The Court answered in the negative, saying that the Act of 1850 'operated as a grant *in praesenti* to the States then in existence', that it 'was to operate upon existing things, and with reference to an existing state of facts', that it '*was to take effect at once*, between an existing grantor and several separate existing grantees', and that as Minnesota was not then a State the Act made no grant to her." [Italics supplied.]

U. S. v. Minnesota, 270 U. S. 181, 202, 203.

In that case the grant to Minnesota by the act of 1860 differed from that to California in specifically excepting from a grant in praesenti "all lands which might be reserved, sold or disposed of (in pursuance of any law theretofore enacted) prior to confirmation of title under the grant—the confirmation being the issue of the patent" (204, 205). Under this exception in the grant it was held that a prior treaty with the Indians constituted a reservation of the lands, and thus was within the excepting clause of the act of 1860. The court also holds that even in the absence of such a specific exception, of lands reserved prior to the grant, these would be "impliedly excepted." In considering the Minnesota act of 1860 as a grant in praesenti the court again relies on the opinions of the Attorneys General and established practice of the Interior Department.

"The Act of 1860 was construed as we here construe it by Secretary Delane in 1874, 1 Copp's P. L. L. 475, and by Secretary Schurz in 1877, 2 id. 1081; and their construction was adopted and applied by their successors up to the time of this suit, and was approved by the Attorney General in 1906, 25 Op. 626. So, even if there were some uncertainty in the Act, we should regard this long-continued and uniform practice of the officers charged with the duty of administering it as persuasively determinative of its construction."

U. S. v. Minnesota, supra, 205.

The opinion of Attorney General Moody so accepted by the Supreme Court was upon a case not as strong as that of appellants' here. After the 1860 grant to Minnesota, the Congress in 1872 authorized the Department of Agriculture to withdraw for forestry certain of the swamp and overflowed lands, just as did the act of August 1852 authorize the Secretary of the Navy to withdraw the lands here patented. The withdrawal of the Minnesota lands was prior to patent

under the act of 1860, and the question was whether the congressional withdrawal of the lands for forestry lands divested the state of its rights under the grant of 1860. The case was weaker for the Minnesota than for the California claim here, for here the swamp land patents have been issued. In deciding that the congressional withdrawal did not divest Minnesota of its rights under the earlier grant, the Attorney General says:

"Your first question is whether the swamp land grant is a grant in praesenti to the State of Minnesota of all the swamp lands therein, to be afterwards identified.

"I shall not dwell upon this question, because your Department and the courts have frequently held that it is such a grant.

"It has been held that the legal title does not pass until patent, and that when it does pass it relates to the date of the granting act. (Rogers Locomotive Works v. Emigrant Company, 164 U. S. 559, 570; Michigan Land and Lumber Company v. Rust, 168 U. S. 589, 591.)

"Aside from the decisions, it seems clear that the *intention of Congress was to give the beneficial title immediately to the State of all swamp lands in it*, as against claimants attempting to initiate rights afterwards, except under laws *theretofore* enacted." [Italics supplied.]

25 Ops. Attorneys General, 628, 629.

We thus see that the Supreme Court in 1926, in U. S. v. Minnesota, supra, reaffirmed the holding of French v. Fyan, supra, in 1877, that a subsequent congressional reservation cannot divest a state of its grant in praesenti of swamp and overflowed lands under the act of 1850. In 1886 the same question came before Mr. Justice Field and Circuit Judge Sawyer with reference to a claimed divesting of California by the act of August 1852 of the lands identical in character with that covered by the patents in this appeal, in San Francisco Sav. Union v. Irwin, 28 Fed. (CC) 708, 709, 715.

Mr. Justice Field relies on French v. Fyan and other cases as establishing the present character of the grant to California of the act of 1850, and holds that the Presidential reservation under the act of March 1852, the reservation here relied on to void California's patent, did not divest California of her title.

At the time of the trial there had been no certification of the lands to California by the Secretary of the Interior. The plaintiffs' case rested on the title granted by the state patent. The government's defense was that the act of 1850 was not a grant in praesenti. Upon this it asserted two propositions: (1) that, since California had no title, the lands were public lands of the United States and hence subject to and withdrawn by the Presidential withdrawal of 1853; and (2) that before listing the lands as swamp and overflowed to the state by the Secretary of the Interior California had no title and hence plaintiffs' showing that the lands were in fact swamp land overflowed in 1850 was not competent evidence.

In disposing of these contentions Mr. Justice Field, sitting with Circuit Judge Sawyer, held:

"This is an action to recover possession of a tract of land situated partly in the county of Napa, and partly in the county of Solano, consisting of 7,413 acres and a fraction of an acre. It is alleged to be swamp and overflowed land, and that the title to it therefore passed to the state by the act of congress of September 28, 1850, 'to enable the state of Arkansas and other states to reclaim the swamp lands within their limits' 9 St. 519.

"The first section of that act grants to the state of Arkansas 'the whole of those swamp and overflowed lands, made unfit thereby for cultivation', which were unsold at the date of its passage. The fourth section extends the provisions of the act to, and confers their benefits upon, each of the other states of the Union in which swamp and overflowed lands are situated.

"The act is a grant in praesenti, to each state then in the Union, of lands situated within its limits of the quantity described. Its language is that they 'shall be, and the same are hereby, granted to said state'—*words which import an immediate transfer of interest and not one in the future.* [708, 709]

* * * * * * *

"On the seventh of April 1874 the state, through her properly authorized officers, issued a patent of the tract in controversy to one George W. Pearson, describing it as swamp and overflowed land, and giving its metes and bounds. Through him, by various mesne conveyances, the plaintiffs trace their title, each having acquired an undivided one-third interest in the premises as tenant in common with the others. The state, by various enactments, had provided for the sale of lands of this character, and no question is made as to the conformity of the proceedings with their requirements in the issue of the patent. *The objection taken is to the acquisition of any title by the state until the lands had been listed and patented to her by the United States.* The patent of the state is the conveyance of whatever interest she had *at that time* in the land; and, if it were within the description of swamp and overflowed land, her interest was paramount to that of the United States, unless their title antedates the act of 1850. * * * In the absence of any action of the secretary of the interior which would be conclusive in the matter as against collateral attack, the testimony of witnesses having knowledge of the subject as to the character of the land was admissible under the decisions mentioned. That testimony clearly showed that the land was subject to periodical overflow by the rising of the tides in the bay of San Pablo, so as to make it unfit to raise the ordinary crops of the country without protecting it with levees from such overflow. [712]

* * * * * * *

"We do not give any weight to the fact that in 1853, by order of the president of the United States, Mare Island was reserved, with all its alleged appendages of tule or marsh lands ordinarily reputed

to belong to such island; *for if such reservation was intended to include all the swamp and overflowed lands in controversy, it was to that extent inoperative—the title, as we have already seen, having passed to the state by the act of September 28, 1850.*" [715] [Italics supplied.]

San Francisco Sav. Union v. Irwin, 28 Fed. 708, 709, 712, 715.

Mr. Justice Field delivered the opinion in the Savings Union case on a trip to his circuit in July 1886. At the succeeding October Term of the Supreme Court he reaffirmed his holding in the Circuit Court that the grant to California was in praesenti in his opinion in the case of Wright v. Roseberry, 121 U. S. 488.

In Wright v. Roseberry, Mr. Justice Field again relies on French v. Fyan as establishing the present character of the grant of the act of 1850, and that thereafter the state cannot be divested by subsequent reservation. He also relies on the same opinions of the Secretaries of the Interior, Stuart and Schurz, cited as establishing the law in U. S. v. Minnesota, which, in turn, cites, at page 205, Wright v. Roseberry as establishing the present character of the swamp land grant to the states. One of the questions in the Roseberry case was whether, the 1850 grant being in praesenti, the holder of the deed from the state could establish by parol evidence the overflowed character of the land at that date. The Supreme Court held it could be so shown because after the 1850 grant the lands "were not afterwards public lands at the disposal of the United States."

"The court below held, and placed its decision upon the ground, that, because the Commissioner of the General Land Office had not certified the lands in controversy to the State as swamp and overflowed, when this action was commenced in 1870, there was no title in the state by the grant of 1850 which could be enforced, thus making the investiture of title depend upon the act of the Commissioner instead of the act of Congress; whereas the certificate of that officer, when the previous requirements of the law have been complied with, is only an official recognition that the lands are of the character designated, and of the completeness of their segregation. The decision is in conflict with its previous decisions, and with the adjudged cases to which our attention has been called.

"In Sacramento Valley Reclamation Company v. Cook, 61 Cal. 341, decided as late as 1882, that court recognized the swamp land grant of 1850 as one in praesenti. Its language was: 'It is as well settled as anything can be by the courts that the donation of swamp and overflowed lands by the United States to the states in which such lands were situated at the date of the passage of the act of September 28, 1850, "was a grant in praesenti, by which the title to those lands passed at once to the states in which they lay, except as to states admitted into the Union after its passage'," citing French v. Fyan, 93 U. S. 169.

"For the error in holding that the certificate of the Commissioner was necessary to pass the title of the demanded premises to the State, the case must go back for a new trial, when the parties will be at

liberty to show whether or not the lands in controversy were in fact swamp and overflowed on the day that the swamp land act of 1850 took effect. *If they are proved to have been such lands at that date, they were not afterwards subject to preemption by settlers. They were not afterwards public lands at the disposal of the United States. Parties settling upon such lands must be deemed to have done so with notice of the title of the State*, and after the segregation map was deposited with the surveyor general of the state, with notice also that they were actually segregated and claimed by the State as such lands.

"Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion." [Italics supplied.]

Wright v. Roseberry, 121 U. S. 488, 520, 521.

Not thereafter being "public lands" of the United States, they therefore could not be withdrawn by the act of 1852 authorizing a reservation from "public lands" as here claimed by the United States to avoid the instant patents to California.

The Appeal in San Francisco Saving Union v. Irwin (136 U. S. 578), came before the Supreme Court shortly after Wright v. Roseberry. The United States appeared on the appeal, giving the decision a finality it could not have against Commandant Irwin, a mere administrative officer. The government's bill of exceptions abandoned the claim that the reservation under the act of 1852 divested California of the lands now in the patents sought to be voided. The sole point raised was whether, there being a grant in praesenti, and the lands no longer public lands, as held in Wright v. Roseberry, but no certification of the lands to the state, the overflowed character of the land in 1850 could be shown by parol. The Supreme Court held on the authority of Wright v. Roseberry that it could. Irwin v. San Francisco Savings Union, 136 U. S. 578, 580.

The government here relies on District Judge Van Fleet's opinion in Sawyer v. Osterhaus, 212 Fed. 765, as overruling Justice Field's and Circuit Judge Sawyer's decision in the Circuit Court in the Irwin case. This was a suit in ejectment brought by Sawyer against Osterhaus, Commandant of Mare Island Navy Yard, and having in possession the swamp lands in Survey No. 34, here in question. Sawyer deraigned title from the Darlington patent. Since California then had not acquired its patent from the United States, Sawyer could not show legal title. The court rested its decision denying ejectment on the ground "that plaintiff has wholly failed to make out, as was incumbent upon him, a legal title to the premises in suit." (775)

Continuing as a dictum, but declaring he did not rest his decision on it because "it was not urged upon the attention of the court", Judge Van Fleet says, "I think" that the Congressional Act of 1850 did not constitute a grant in praesenti, and hence the two naval reservations would defeat the right of California to a patent. Not only is this a mere dictum, but had it been a holding, it decided nothing in favor of the United States. The Attorney General made a

special appearance in the case, claiming it should be dismissed because the United States was the real party in interest, and had not given permission to be sued. The motion was denied on the ground that the title of the United States was not involved. (Sawyer v. Osterhaus (D. C.), 195 Fed. 655.) A judgment for or against the Commandant's possessory right would not estop either the United States or the California claimants in a subsequent suit between them. Hussey v. U. S., 222 U. S. 88; Carr v. U. S., 98 U. S. 433, 437.

This District Court dictum was many years before U. S. v. Minnesota, and is of no weight against the latter's holding of the present character of the grant to California. Judge Van Fleet's error rested on the assumption that the grant of 1850 is a grant in futuro vesting nothing in California until the date of the certification of the lands by the Secretary of the Interior or of the ensuing United States patent, and that before that time the swamp lands remained "public lands" subject to a Presidential reservation. He cites certain decisions on school land grants as supporting this thesis, failing to note the essential difference between the present grant of swamp lands and the future and promissory quality of the school land grants.

The school land case of Heydenfeldt v. Daney, 93 U. S. 634, 638, 639, cited by Judge Van Fleet, and which precedes Wright v. Roseberry, construes the school land grant as in futuro. Wisconsin v. Hitchcock, 201 U. S. 213, also cited by him, rests on U. S. v. Thomas, 155 U. S. 577, 582. They hold merely that lands of which the Indians had a right of occupancy prior to the school land grant, were not included in it. In U. S. v. Morrison, 240 U. S. 192, the school land grant to Oregon was held to be in futuro and not to prevent an intervening reservation for forestry purposes.

All these cases precede U. S. v. Minnesota, 270 U. S. 181, 210, where the distinction between the two characters of grant is clearly made. One of the cases relied on in Sawyer v. Osterhaus, supra, is Minnesota v. Hitchcock, 185 U. S. 373, deciding the future vesting of a school land grant to Minnesota. In U. S. v. Minnesota, the school grant of the Hitchcock case is distinguished from swamp land grants, as follows:

"The case of Minnesota v. Hitchcock, 185 U. S. 373, is cited as making for a different conclusion; but it does not do so. The question there was whether the State was entitled, under the school land grant, to sections 16 and 36 in the part of the Red Lake reservation which was ceded under the Act of 1889. That grant was expressed in words of promise, not of present grant. Title was to pass when the lands were identified by survey, if they were *then* public; and if *at that time* they were not public but otherwise disposed of, the State was to be entitled to other lands in their stead." [Italics supplied.] U. S. v. Minnesota, supra, 210.

The court regarded the holding that the swamp land grants were in praesenti was necessary to the decision of U. S. v. Minnesota. If they were in futuro there would have been no question that the

Indian treaties of 1863 and 1865 took the swamp and overflowed lands of the 1860 grant which had not then been certified to the state. On the question whether a treaty with another nation had some higher constitutional power to divest Minnesota's title than a statute reserving the lands, the court expresses grave doubt, but avoids deciding it by a construction of the treaty's terms as not intending such taking from the state. U. S. v. Minnesota, supra, 208, 209. If French v. Fyan, supra, and the succeeding cases had not settled the question of the immediate vesting of the full equitable title of the swamp lands in California, a similar construction of the act of August 1852 would lead us to conclude that Congress did not intend to take any lands from California of which lands it had vested in California the full equitable title; and that the 1850 reservation of Mare Island "from sale" contemplated the upland portion of the island, which, until recently, contained all the Navy Yard plant, and not California's swamp and overflowed lands on its then doubtful borders.

The patents and appellee's admission of the swampy character of the lands, and the case of French v. Fyan and succeeding cases, reviewed above, conclusively establish that whatever title the United States had prior to the grant of September 28, 1850, thereafter, at most, it held the bare legal title in trust for California, to which then had been transferred, in praesenti, the entire equitable interest.

We therefore hold that neither of the attempted reservations made by the President and the Secretary of the Navy after the Congressional grant of 1850 divested California of its full equitable interest vested by the grant.

V. The United States seeking equity, can take no benefit against California and its successors from the decree in United States v. Bissell and Aspinwall confirming Castro's invalid Mexican title, because

(a) If that suit, in its ordinary course, would be binding upon California, as the then holder of the equitable title under the prior grant of 1850, in this case it would not so be binding because the United States, holding whatever legal title it acquired from Mexico, and required by the statute to defend it as California's trustee against the Castro title, prior to appearing against that title, acquired it for its own governmental use and thereafter appeared before the Land Commission, and waging a pretended adversary proceeding in which its private interest was adverse to its trust, carried it to a decree adverse to California;

(a) We consider the contention of the government relative to the advantage it may take of the District Court decree of 1930 rendered in the Bissell and Aspinwall case, having in view that its burden of proof to cause cancellation of the patents can be sustained only on "that class of evidence which commands respect."

The United States contends that the California title to the lands was defeated by the 1930 decree of the District Court, given on appeal in the proceedings before the Land Board created by the Act of

Congress of 1851. The Act provides for filing with the Board of Land Commissioners of all claims to land based on Mexican titles and their adjudication as against the United States.

The United States' briefs here claim that whatever rights California held when the litigation was pending before the Land Board, then were in the United States and that California could not there appear as a party. We here consider this contention, disregarding any effect of the patent of 1928 as reverting the transfer of the legal title back to 1850. We have seen that, since the lands are admitted to be swamp and overflowed, the United States, prior to the contested patents, held a bare legal title in trust for California. As was said by the Supreme Court, in a case determining the condition of unpatented swamp and overflowed lands, by applying to them the law regarding the homesteader,

"'*The Government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law.* Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the land department.' Orchard v. Alexander, 157 U. S. 372, 383." [Italics supplied.]

Brown v. Hitchcock, 173 U. S. 473, 478.

Whatever title Castro had had been acquired by Messrs. Bissell and Aspinwall. They presented their claims to the Land Board and issue was joined by the United States, the adversary party created by the statute. Although appellants, before the decree rendered in 1930, held the 1928 patents giving them the legal title, they were never made parties to the action, nor asked to present their rights amicus curiae. The decree was obtained without their knowledge.

While the proceedings were pending the United States in 1853 bought from Bissell and Aspinwall their claim under the Castro title. We thus have the United States claiming here that it acquired the Mexican title from its adversary parties and then proceeded to the trial of the controversy as to its validity in simulated opposition to litigants no longer having an interest, and that it thereby established in itself a title adverse to California.

The depositions taken in this situation, reprehensible in a court of law, and, if anything, more so in a court of equity, show a most perfunctory cross-examination of the witnesses, presumably offered by parties opposed to the government, but, in fact, representing its acquired interest. The result of such an examination by pretended adversaries seeking the single objective of a perfect title gave to Governor Alvarado and the other witnesses the opportunity to disprove the fraud suggested in some of the questions and found in the Bouldin v. Phelps case, supra. In its pretended adversary position the government "rode to a fall" to perfect the title it had acquired.

However, this court is not required to measure the industry and effectiveness of the performance of the government's statutory duty and obligation to California to resist the Castro claim. Once the

government acquired the interest adverse to California, its cestui, it can take no advantage from the proceeding before the Commission.

"We have no desire to weaken or qualify in any way the wholesome doctrine laid down by this court in the case of Michoud v. Girod, 4 How. 503, that a trustee cannot legally purchase on his own account that which his duty requires him to sell on account of another, nor purchase on account of another that which he sells upon his own account—in other words, he cannot unite the two opposite characters of buyer and seller. So jealous is the law of dealings of this character by persons holding confidential relations to each other, that the cesqui que trust may avoid the transaction, even though the sale was without fraud, the property sold for its full value, and no actual injury to his interests be proven."

Hoyt v. Latham, 143 U. S. 553, 566.

"Convinced that the relation of the parties was fiduciary and not merely contractual, we are unable to accept the view thus outlined. It would require a clear case to warrant a court of equity in declaring that the trustees of an express trust, in the very course of their administration of the trust, had acquired a dominant interest in the trust property and in effect a discharge of the trust, through mere inattention or even negligence—not raising an estoppel or amounting to laches—on the part of the parties beneficially interested, or of their executive officers. Conduct merely equivocal, or apparently inconsistent with a vigilant insistence upon the obligations of the trustee, is not sufficient to discharge a trust. The cestui que trust is entitled to rely upon the fidelity of the trustee, until plainly put on guard against him.

Chicago &c. Ry. v. Des Moines &c. Ry., 254 U. S. 196, 220.

On the basis of the government's assumption that California was not a "third persons" and could not appear as a party, because her equity was held in trust by the United States, the Government appears in a position to which the language of Mr. Justice Chase seems applicable: "I think the United States are not absolved in dealing with their citizens, from the obligations of honesty by which individuals are controlled." Mason v. U. S., 17 Wall. 67.

It does not ameliorate the situation, but rather heightens it, when we consider that the evidence of the depositions so taken shows that Castro did not have any grant of land from the Mexican Government under the clear provisions of the Mexican law.

It cannot be said that the United States unconsciously violated its duty to its cestui. On April 9, 1853, over a year before the first deposition was taken, the United States Attorney General Caleb Cushing gave an opinion on the Castro proceedings before the Board of Land Commissioners. (Vol. 8, p. 22, Op. Atty. Gen.) The review is made with reference to the effect of the purchase by the United States of the Castro title pending these proceedings. His letter to the Secretary of the Navy, in specific language, sustains the contention here made by appellants. Speaking of the purchase of

this Castro claim he says this is done by "the payment of a large sum of money to silence and extinguish it, which seems has accordingly been done." Discussing the further conduct of litigation, he says:

"True, the United States may decline to resist the claim of Castro on the pending suit, and, by consent, and by omission, to enter an appeal, may, in fact *take the side of the adversary party*, his claim being vested in them, and allow a final judgment to be entered affirming the grant to Castro. *I, as Attorney General*, in view of the special duties imposed on me by the Acts for the settlement of private land claims in California, and of my general obligation to look after the rights of the United States in the premises, *cannot pursue this course*. I must not admit that the purchase of the Castro claim by the United States does not operate in any way, either by implication or otherwise, as a waiver of the general rights of the United States in the premises, or as an assent, either express or implied, to the pretended validity of the grant to Castro." [Italics supplied.]

The general rights of the United States referred to included its right as trustee for the State of California to conduct a true adversary contest against the Castro claim. The rights of the State of California are recognized in Attorney General Cushing's opinion, as follows:

"I am satisfied that the State of California may set up, and probably maintain, title as against the United States, to so much of Mare Island as is subject to overflow by water, periodically or otherwise, that is, at least to all below high water mark.

* * * * * * *

"In the second place, by an Act of Congress, passed the 28th day of September, 1850, all the swamp and other overflowed lands in the State of Arkansas made thereby unfit for cultivation are granted to said state; and then provisions of the Act are extended to and its provisions conferred upon each of the other states of the Union in which such swamp and overflowed lands may be situated. The State of California had already, by Act of September 9, 1850, been admitted into the Union, and is, of course, entitled to all the uncultivable over-swamped land within its limits, as against the United States."

His opinion further expresses a Lawyer's proper doubt that the transaction between Castro grantees and the United States would affect the right of any "adverse claimants save the grantees of Castro." His language is:

"In addition to which it is to be considered, that, whatever might be the legal effect, by way of waiver, estoppel, or otherwise, of any transaction in the premises by the Castro grantees and the United States, probably no such transaction could affect the rights of Sanford, or any other adverse claimants save the grantees of Castro. Sanford, or any other party, may not be precluded by anything the United States can do, from setting up a claim better than Castro's,

that is, denying the validity of the original grant to Castro, and so ousting the United States."

The appellant claims some adjudicatory force to this opinion of the Attorney General. We cannot agree with this contention, but do agree that the prescience of this able lawyer truly recognized the legal principles controlling the action of the government in the Castro litigation before the Board. The appeal to the District Court from the decision of the Land Board was taken by the Attorney General in February 1856. The judicial farce continued there, the pretended attorneys for the Castro interest resisted the appeal. Then followed, in 1857, an unsigned decree affirming the decision of the Land Board which is described as "rejecting the [Castro] claim." It then proceeds to declare that it is a good and valid claim. Then follows an appeal by the United States to the Supreme Court. Then a vacation of the appeal, no doubt because there was no decree.

The unsigned decree left the case under submission to the court for 73 years. The United States, on April 15, 1930, moved for the decree presented here as foreclosing the State of California. The intent to shut out the State of California by this non-adversary proceeding is openly declared in the 1930 decree's finding that the United States had purchased the Castro title,

"* * * and that all persons claiming by, under, or through the Appellants or the Appellees or any of them, are chargeable with notice of this action and of everything that has been done therein, and therefore, that no rights of third persons have intervened or could intervene."

When this decree was rendered appellants holding the California title were the parties referred to as "claiming by, under, or through" the United States. California then held the United States patent sustaining appellants' claim to the land. The declaration that California or its successors could not be a party to the action by which its title is claimed to be barred, seems to impose a duty on the United States to notify it of the proceeding and ask it to advise the court amicus curiae as to any defect in Castro's title, about which the Attorney General had expressed such doubt. That it did so is a fitting termination of the whole litigation.

Since the evidence shows the United States conducted the concealed non-adversary proceeding to secure Mare Island as a Naval Station, with the full knowledge that it would embarrass the claim of the State of California to the swamp lands, the situation is not unlike that considered in the case of U. S. v. Throckmorton, 98 U. S. 61.

There the United States, by its bill in equity, sought the cancellation of its patent which had been granted to one Richardson, the holder of the Mexican title, pursuant to a decree of the Board of Land Commissioners. The claim of the United States was that its agent at the hearing before the Commission had betrayed its interest to its adversary, Richardson, by failing to disclose to the Land Board evidence of fraud in the acquisition of the title from Mexico. The

court held the betrayal was not shown, it not being alleged that the agent "was then interested in the [adversary] Richardson claim." If such interest had been shown, "the case would have come within the rule which authorizes relief." U. S. v. Throckmorton, supra, 69.

The rule referred to as authorizing relief is stated by the court at pages 65 and 66, as follows:

"But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, *there was in fact no adversary trial or decision of the issue in the case.* Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these and similar cases which show that there has *never been a real contest in the trial or hearing of the case are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and a fair hearing.*" [Italics supplied.]

U. S. v. Throckmorton, supra, 65, 66.

In equity the difference between the contentions of the United States in the Throckmorton case and in the case at bar has a profound legal as well as ethical significance. In the former it sought relief against an outstanding title, which would have been given if its agent in the Land Board had been interested in the Mexican claim. Here it asserts the Board's action adjudicated to it the Mexican title in which, not merely it had an interest, but which, previously and unknown to the Land Board, it had acquired in its entirety. It does this purposefully to aid it in holding its Mare Island lands against the claim of cestui.

The case falls within the rule stated in the Throckmorton case and the appellants are entitled to the relief. Such relief is not confined to annulling the decree and reopening the Bissell case for a further hearing on matters alleged to have occurred nearly a century ago. Proper relief here can be given by granting the motion to exclude from evidence the record in the Bissell and Aspinwall case, because "since the 4th day of January 1853 Bissell and Aspinwall, grantors of the United States, were no longer interested in the premises."

It may be suggested that the majority opinion reasons in a circle; that the majority assume that the United States held the legal title in trust for the State under the Swamp Land Act and that therefore the appellants, as successors in interest, may question the confirmation proceedings; whereas, so it may be urged, until the confirmation proceedings are disposed of no equity in the State is shown which would give it, or appellants as its successors in interest, any standing to attack the proceedings.

This line of argument wholly misconceives the status of California and its successors as recognized by the government's bill, and its burden of proof to obtain its remedy. Implicit in this bill, so recognizing the patents which it seeks to cancel, is the recognition of the status of the United States as holder of the bare legal title in 1850, at the time of the grant to California, in trust for California as its cestui, having the whole equitable interest.

The situation might be differently conceived if the State of California or its successors in interest were maintaining some sort of a legal proceeding against the government, in which, as complainant, it was seeking to establish title to the land and to procure a patent based upon a final determination of title. There the burden of proof would be upon the State or its successors. In such a suit it well might be argued that in attempting to base their claim upon the trustee and cestui relationship they were seeking to lift themselves from their stance by their own bootstraps.

Here, since the government's bill recognizes the existence of the trustee-cestui relationship of 1850, culminating in the patent of 1928, which it seeks to destroy, it has the heavy burden of proof stated in the authorities cited above to establish the contrary. It is the government which must lift appellants from their stance on the trustee-cestui relationship.

So far as concerns this court, sitting as a court of equity, and considering the relationship of the United States to its cestui, the State of California, we agree with the assignment and specification of error of appellants that the Land Board action had terminated as far as affecting California, when the two litigants merged their adverse interests by the sale to the United States. In equity that case ended before any testimony was taken. So far as concerns the State of California and these appellants nothing that hereafter occurred, including the decree of April 15, 1930, can, in equity, affect either their equitable or legal rights.

In the alternative, it is also arguable, but not necessary to decide, that if the decree made valid to the United States the invalid Castro title, and hence falsely proved that the lands were not ceded to the United States by the Treaty of Guadalupe Hidalgo and therefore not granted to California in 1850, the United States would hold the Castro title in trust for California.

V. (b) In this suit in equity the record in Bissell and Aspinwall's action is not made "conclusive" against appellants by §15 of the Land Board Act.

The claim of the State of California to the swamp and overflowed lands of Mare Island is that of interest of a third person alien to the Land Commission action and to both the noninterested Bissell and Aspinwall and the conflicting interested United States, as the term "the interest of third persons" is used in §15 of the Act.

Much of the comment on the conduct of the government would not be warranted did it not insist that, by section 15 of the Act of 1851, creating the Land Commission, the record and decree in the Castro

proceeding there are "conclusive" against California and its successors in interest. The government insists that, by the decree in that case, California is bound to be under the jurisdiction of the Land Board and court and bound by "its decision", and not to have the interest of an alien third person.

Congress, in passing the Land Commission Act of 1851, must have done so in view of its act of granting, in the previous year, to California the vast area of swamp and overflowed lands and California's interest therein as against those of invalid Mexican claims.

Section 15 of the Act provides:

"That the final decrees rendered by the Commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this Act shall be conclusive between the United States and the said claimants *only* and shall not affect the *interests of third persons*." [Italics supplied.]

The phrase "interests of third persons" in the Act of 1851 as affected by a judgment to which they were not parties, recently, in 1849, had been considered by the Supreme Court in the leading case on that subject, Lord v. Veazie, 8 How. 251. It was a decision of such importance that it must have been familiar to all the bar and to the Congress. In that case, on motion of "third persons", alien to the action and the writ of error, for its dismissal, the court granted the motion, holding:

"* * * The objection in the case before us is, * * * that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the *interest of third persons*, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be.

"* * * A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity, and no writ of error will lie upon it. This writ is, therefore, dismissed." [Italics supplied.]

Lord v. Veazie, 8 How. 255.

In view of this decision it would require an unequivocal decision of the Supreme Court to establish that California was not intended by Congress to be included in the phrase "interests of third persons" used in the Land Board Act of 1851. There is no such decision.

The government asserts that the Supreme Court has decided that Section 15 had made conclusive the decree and record in the proceedings before the Land Commission as against California and its successors in interest by the following holding:

"* * * The term 'third persons', as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the *government* in disposing of the property (492).

"As *against the government* this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming *under* the government by title *subsequent*" (492). [Italics supplied.]

Beard v. Federy, 70 U. S. 478, 492, 492.

To the same effect, More v. Steinbach, 127 U. S. 70, 83; Knight v. U. S. Land Assn., 142 U. S. 161.

In all three of these cases, one of the parties relied on the record of the proceedings before the Land Commission, with a decree actually in favor of the Mexican claimant. In none of these cases, nor in any of the many cited by the government, was there any contention raised that, in the proceedings embodied in the record, the government had an interest in maintaining the position of the opposing Mexican claimant, and hence had not conducted a true adversary defense. In none was the decree drawn, as it was here, with findings and conclusions aimed to make it final against the government's cestui que trust.

That is to say, in none was the court taking cognizance of such equitable "interest of third persons", as emerged in this case upon the confession of the government that it had bought its adversary title and then failed to defend its pretendedly opposed claim, and thereby connived at and procured a decree which was consciously drawn to destroy the "third person" right.

Beard v. Federy, supra, 492, speaks of the effect of the record only where it confirms some Mexican claim of title. It holds no more than that. So far as such a Mexican confirmation is concerned, "As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent."

Here, however, the question is whether the "record" "is conclusive" in favor of the government and against the parties claiming under the government by title acquired from the government prior to the record. In that regard the California claim is clearly within the Beard v. Federy definition of a "superior title" such as could "resist successfully any action of the government in disposing of the property" for a Naval Reserve.

It must be remembered that the government's bill confesses the acquisition of the alleged Mexican title from Bissell and Aspinwall on January 4, 1858 (Tr. 8) that is before any step in the trial was taken. The decree in the "record", which the government claims Section 15 makes conclusive against California and its successors in interest, finds this acquisition of title from the claimant by the supposed adversary government, whereby the adversary character of the proceeding ceases. It then finds, in effect, that since California's successors in interest are "claiming by, under, and through" the government they are parties in the action because they "are chargeable with notice thereof." The decree then holds, "therefore, that no rights of third persons have intervened or could intervene."

This extraordinary portion of the record which the government claims is made conclusive against the appellants by Section 15 of the Land Commission Act is repeated:

"And it further appearing, that all the right, title, and interest of the Appellees herein in and to the said claim, have passed to and

have been acquired by the United States, the Appellant herein, by purchase from the said Appellees [Jan. 4, *1853*] and that all persons claiming by, under, or through the Appellants or the Appellees or any of them, are chargeable with notice of this action and of everything that has been done therein, and therefore, that no rights of third persons have intervened or could intervene.

"Now, therefore, on motion of Geo. J. Hatfield, Esq., United States Attorney for the Northern District of California, Attorney for said Appellant, made on the 15th day of April, 1930, that a decree be entered Nunc Pro tunc in conformity with the said Order and the Court now being fully advised in the premises, the said Motion is hereby granted and it is hereby ordered that this decree of confirmation in said cause confirming in all particulars the decision of said Board of Land Commissioners be entered Nunc Pro Tunc, as of the 2nd day of March, in the year *1857*. [Italics supplied.]

"Dated in open Court this 15th day of April 1930."

(Tr. 290, 291.)

The language of Section 15 on which the government claims the decree is conclusive against the State of California, is plainly contra to this contention. The conclusiveness is confined to the government and Mexican claimant by the use of the word "only." The language of Section 15 is, "That final decrees * * * shall be conclusive between the United States and the claimant *only*." [Italics supplied.] This language clearly excludes the decree's conclusiveness as to claims between the government and California. There is nothing in Beard v. Federy, supra, or subsequent cases relying on it, which purports to decide anything on the controversy between the California interest and the government, presented in the instant case.

We hold the government's contention cannot prevail. The decree it relies on is not made conclusive by Section 15 of the Act as against California and its successors, and, in this proceeding in equity, California had and its successors have "the interest of third person" not parties but alien to the record in which the decree appears.

V. (c) The suit in the District Court rendering the decree relied upon, and the prior proceeding before the Land Board require the adjudication of the validity of Mexican claims of title with all the elements of judicial functions.

Even if the claimants of the California title had been permitted to sue the United States at law in ejectment, they would maintain their patent title as against the decree in the Land Board proceedings, since that was a one-party non-adversary action in which the Commissioners and District Court had no issue before them, and hence jurisdiction of nothing for their adjudication.

Since the action of Bissell and Aspinwall v. the United States ceased and determined in January 1853, when, before testimony taken, the United States acquired their claim, there has been nothing subjudice since that date which would prevent the issue of a patent to California.

All the authorities are agreed that the provisions of the Treaty of Guadalupe Hidalgo, providing for the recognition of Mexican titles and interests, are not self-executing. The Treaty imposes merely a political obligation, and it was necessary that its provisions should be implemented by Congressional action. Beard v. Federy, 3 Wall. 478, 491; Knight v. U. S. Land Comm., 142 U. S. 161, 184, 186, 188; Foster v. Neilson, 2 Pet. 253, 314, 315; Barker v. Harvey, 181 U. S. 481, 486, 487.

This the Congress could have done by various legislative provisions. Among others, it could have provided that in all the Federal and State tribunals in which the land was situated, the Mexican claimant could commence an action quasi in rem against all persons claiming adverse interest, in which the United States and any other adverse claimant might or might not appear as it was advised. There are many examples of this form of action. See Johnson v. North Star Lumber Co. (CCA–9) 206 Fed. 624, 628; Ennis-Brown v. Central Pacific Ry. Co., (CCA–9) 235 Fed. 825.

Obviously had such a form of action been created the statute would not contain the provision that the decree rendered "shall not affect the interests of third persons." There would be no third persons.

Instead, however, the United States created the Board of Land Commissioners, in which the claimant of the Mexican title would be the sole party, in a plaintiff capacity, and the United States should be, as against each claimant, the adverse defendant. From this Board decision either party could appeal to the District Court, where the issue was tried de novo.

This adversary character appears from the following provisions of the Act of 1851 creating the Board of Land Commissioners. Section 4 provides for the law agent of the United States to attend the meetings of the Board and gather the testimony "in behalf of the United States", and attend the taking of all depositions, notice of which must be given to him or to the United States District Attorney. Similar notice must be given by the United States to the claimant of the Mexican title.

Section 8 provided that:

"* * * it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim."

By Section 9 the unsuccessful party may seek review of the decree of the Board in the District Court. Here service was required upon the successful adversary, who was "bound to answer" as in any other adversary action. Thereupon the "case shall stand for trial", not only upon the evidence before the Board but upon other evidence offered—that is, a trial de novo. By Section 10 appeal was allowed to the Supreme Court by the "party against whom the judgment was rendered."

These provisions show that the duty of the Board to "ascertain and settle" the validity of the Mexican claim was to ascertain and settle

it as between the two adverse parties. Of course, the United States, as defendant, could admit the validity of the claim, either by an express statement in the record or, as with the case of any defendant, by failing to appear and oppose after service of notice of the pendency of the action; but this no more removes its adversary character than such admission in a common law action makes a common law action non-adversary.

That the action before the Land Board and the District and Supreme Courts is truly judicial in character has been repeatedly held by the Supreme Court:

"Nor can it be said that there is anything unjust or oppressive in requiring the owner of a valid claim, in that vast wilderness of lands unclaimed and unjustly claimed, to present his demand to a tribunal *possessing all the elements of judicial functions, with a guarantee of judicial proceedings*, so that his title could be established if it was found to be valid, or rejected if it was invalid. [Italics supplied.]

Botiller v. Dominquez (1889), 130 U. S. 238, 250.

See also Grisar v. McDowell, 73 U. S. 363, 374; Beard v. Federy (1866), 70 U. S. 478, 480; U. S. v. Throckmorton (1878), 98 U. S. 61, 64; Boyle v. Hinds (1874), 3 Fed. Cas. #1759, p. 1111.

The Supreme Court early held, in a case at law, that in an action in which the real party in interest is both plaintiff and defendant where there is no issue presented of which the court can take jurisdiction, any purported decree on judgment or other action taken in such a pretended suit, if not totally null and void, is at least not binding upon anyone not appearing. The invalidity is at law, and does not rest on the creation of any equitable obligation in the person claiming the benefit of the judgment. The leading case is Lord v. Veazie (1849), 8 How. 251, in which the pertinent facts are found in the order dismissing the writ of error, as follows (256):

"Order. This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Maine, and was argued by counsel, and it appearing to the court here, *from the affidavit and other evidence filed in the case by Mr. Moor, in behalf of third persons not parties to this suit*, that there is *no real dispute between the plaintiff and defendant in this suit, but, on the contrary, that their interest is one and the same*, and is *adverse to the interests of the persons aforesaid*, it is the opinion of this court, that *the judgment of the circuit court entered pro forma in this case is a nullity and void*, and that no writ of error will lie upon it. On consideration whereof, it is now here ordered and adjudged by this court, that the writ of error be, and the same is hereby, dismissed, each party paying his own costs, and that this case be, and the same is hereby, remanded to the said court, to be dealt with as law and justice may require." [Italics supplied.]

The reasoning of the opinion is (8 How. 255, 256):

"It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves—and to do this upon the full hearing

of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended and treated as a punishable contempt of court.

"The suit is spoken of, in the affidavits filed in support of it, as an amicable action, and the proceeding defended on that ground. But an amicable action, in the sense in which these words are used in courts of justice, presupposes that there is a real dispute between the parties concerning some matter of right. And in a case of that kind it sometimes happens that for the purpose of obtaining a decision of the controversy, without incurring needless expense and trouble, they agree to conduct the suit in an amicable manner, that is to say, that they will not embarrass each other with unnecessary forms or technicalities, and will mutually admit facts which they know to be true, and without requiring proof, and will bring the point in dispute before the court for decision, without subjecting each other to unnecessary expense or delay. *But there must be an actual controversy and adverse interests.* The amity consists in the manner in which it is brought to issue before the court. And such amicable actions, so far from being objects of censure, are always approved and encouraged, because they facilitate greatly the administration of justice between the parties. *The objection in the case before us is, not that the proceedings were amicable, but that there is no real conflict of interest between them; that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be.*

"A judgment entered under such circumstances, and for such purposes is a mere form. The whole proceeding was in contempt of the court, and *highly reprehensible*, and the learned district judge, who was then holding the circuit court, undoubtedly suffered the judgment *pro forma* to be entered under the impression that there was in fact a controversy between the plaintiff and defendant, and that they were proceeding to obtain a decision upon a disputed question of law, in which they had adverse interests. *A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity, and no writ of error will lie upon it.* This writ is, therefore, dismissed." [Italics supplied.]

Concerning the violation of professional ethics involved in so imposing on the court, the Supreme Court justifies the position of Attorney General Cushing in refusing to continue the prosecution of the Bissell and Aspinwall case before the Board (8 How. 264):

"It is proper to say that the counsel who argued here the motion to dismiss, in behalf of the parties to the suit stand entirely acquitted of any participation in the purposes for which these proceedings were instituted; and indeed could have had none, as they

were not counsel in the circuit court, and had no concern with the case until after it came before this court. And we are bound to presume that the counsel who conducted the case in the court below were equally uninformed of the design and object of these parties; *and that they would not knowingly have represented to the court that a feigned controversy was a real one.*" [Italics supplied.]

A case which, if anything, is even stronger upon its facts is Cleveland v. Chamberlain (1862), 1 Black 417. There the proceeding was in fact adversary throughout the trial in the lower court and until after judgment was rendered against Chamberlain. Pending appeal, Chamberlain acquired the interest of Cleveland and sought to continue the litigation for the purpose of adversely affecting the rights of those who were not parties. The Supreme Court held that the rule of Lord v. Veazie, supra, was entirely applicable, saying (at p. 425):

"This appeal must be dismissed. Selah Chamberlain is, in fact, both appellant and appellee. By the intervention of a friend he has purchased the debt demanded by Cleveland in his bill, and now carries on a pretended controversy by counsel, chosen and paid by himself, and on a record selected by them, for the evident purpose of obtaining a decision injurious to the rights and interests of third parties.

"*There is no material difference between this case and that of Lord v. Veazie* (8 How. 254), when the whole proceeding was justly rebuked by the court as 'in contempt of the court, and highly reprehensible.' That case originated in a collusion between the parties. In this case the appellee, who was a judgment-creditor of the La Crosse and Milwaukie railroad, filed his bill to set aside a fraudulent conveyance of the debtors' property made to the appellant, and other fraudulent conveyances of their lands made to certain directors of the company, who were also made parties respondent. The case was prosecuted with vigor by the complainant till a decree was obtained (on the 11th of February 1859), setting aside the various assignments, and the case 'committed to a master to ascertain and report the annual income of the several lots described in the bill', &c. This was not a final decree. Nevertheless, an appeal was permitted to be entered by Chamberlain on 12th of February 1859. But the record was not brought up to this court for a year and a half, nor so long as there were parties litigant who had adverse interests. About a month after the decree was entered, Chamberlain became the equitable owner of Cleveland's judgment, and the 'dominus litis' on both sides. He then agreed to pay counsel, who appeared for Cleveland, the appellee, but for anything that appears without the knowledge of the counsel, who, in July 1860, entered a discontinuance as to the parties, against whom a decree had not been entered.

"*It is plain that this is no adversary proceeding, no controversy between the appellant and the nominal appellee.* It differs from the case just cited in this alone, that *there* both parties colluded to get up

an agreed case for the opinion of this court; *here*, Chamberlain becomes the sole party in interest on both sides, makes up a record, and has a case made to suit himself, in order that he may obtain an opinion of this court, affecting the rights and interest of persons not parties to the pretended controversy.

"We repeat, therefore, what was said by the court in that case: 'Any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law, which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended and treated as a punishable contempt of court.'" [Italics supplied.]

To the same effect and applying the same principles are:

South Spring Hill Gold M. Co. v. Amador Medean Gold M. Co. (1892), 145 U. S. 300;
Weaver v. Kelly (CCA-5, 1899), 92 Fed. 417;
The W. Talbot Dodge (1926), 15 Fed. (2) 459;
Corchrane v. Deener (1877), 95 U. S. 355, 356;
American Wood Paper Co. v. Heft (1869), 75 U. S. 333, 336;
Muskrat v. U. S. (1911), 219 U. S. 346, 361;
Nor. Pac. Ry. Co. v. Boyd (1913), 228 U. S. 482, 505, 506;
McArthur v. Scott (1885), 113 U. S. 340, 404;
People ex rel. Oliver v. Knopf (1902), 64 N. E. 842, 848;
Board of Supervisors v. Buckley, 38 So. 104, 106, 107;
Nor. Pac. Ry. Co. v. Snohomish County, 172 Pac. 878, 879–880.

We hold that the motion to strike from the evidence the judgment and record in the Bissell and Aspinwall case should have been granted, because, as soon as the Castro title was acquired by the United States, that case presented no issue of an adversary character upon which the District Court or the Land Board could take jurisdiction.

The principle of these cases answers the government's contention that the patents should be cancelled because the Castro claim was subjudice during all the seventy-three years the government refrained to take, in the Bissell and Aspinwall action, a judgment, apparently against itself, but really in its favor. Since the government seriously urges this proposition in addition to all its other actions and contentions of ethical significance, in its attempt to keep its Naval Station lands from the appellants, it may be remarked that it has shown restraint in not waiting for, say, another century, in entering the Bissell and Aspinwall judgment.

We further hold that, since there was no such action pending, there was nothing there subjudice, and hence nothing there to prevent the issue of the patents.

VI. The Treaty of Guadalupe Hidalgo did not reserve lands not granted by the Mexican Government, because Bissell and Aspinwall claimed Castro had received a grant, of which there is no evidence whatsoever. There was no withdrawal of such or any unknown claims to lands in New Mexico and California until Congress created tribunals for their determination.

The government contends that, because Bissell and Aspinwall asserted claim to a non-existent grant of the lands by the Mexican Government, which the United States Attorney in Bouldin v. Phelps, supra, established was executed after the Treaty of Guadalupe Hidalgo, they must be deemed withdrawn by that Treaty. It will be remembered that, even assuming the evidence in the Bissell record as competent against California, under the decisions of the Supreme Court Castro had no title at all; so the question is one entirely apart from the effect of the treaty as withdrawing inchoate titles perfectable before American tribunals.

The government does not cite a case from the score or more Mexican grant cases decided by the Supreme Court which holds that there is such a treaty withdrawal of any lands, much less of lands to which no title whatever is granted. On the contrary, there are two cases squarely holding against the contention, and many others where such a withdrawal by that treaty would have made unnecessary the extended discussion concerning the existence and effect of a withdrawal by congressional legislation subsequent to the treaty.

The two holdings that the treaty did not constitute such a withdrawal are Lockhart v. Johnson, 181 U. S. 516, and Lane v. Watts, 235 U. S. 17, 22. Among cases failing to recognize such a treaty withdrawal and treating the lands only as later withdrawn when subjudice under proceedings provided by statutes enacted after the treaty are Newhall v. Sanger, 92 U. S. 761; Cameron v. U. S., 148 U. S. 301; and Southern Pacific Ry. v. U. S., 200 U. S. 354.

Besides California, the lands ceded by the treaty included those constituting the Territory of New Mexico. It is apparent that the parties signing the treaty at Guadalupe Hidalgo in 1848 did not look forward to no treaty withdrawal of claimed lands in New Mexico and a withdrawal by the same treaty of the lands in California.

To facilitate the determination of the Mexican claims to lands in these two areas, Congress in 1851 created the Land Board to consider the California claims, and in 1854 gave similar powers to the Surveyor General for the Territory of New Mexico. While these tribunals had before them claims to these lands, they were deemed reserved from entry for the period that they were subjudice. The question of their status as public lands, subject to disposition as such, prior to the acts creating the functions of the Land Board and the Surveyor General, and subsequent to their rejection of claims, was before the Supreme Court in the first two cases. Their status, while subjudice, was before these tribunals in the last three.

In Lockhart v. Johnson, supra, a Mexican title to lands in New Mexico was subjudice before the Surveyor and hence withdrawn from entry by the terms of the Act of 1854. The Supreme Court, after construing an amendment to the act, made on March 3, 1891, held that the lands were no longer withdrawn from entry by any act of Congress. A mining claim was then made which was within the claimed limits of the grant but thereafter found to be outside.

It will be noted that, unlike the Castro claim, here was a valid Mexican grant. Its unsurveyed boundaries were not then determined.

The court held the lands open to entry and sale under the laws of the United States, though within the claimed limits of the Mexican grant, unless such lands were "reserved from entry and sale or other disposition by the United States by reason of the provisions of the treaty with Mexico" (521). In deciding that there was no such reservation of the ceded lands by the treaty the Supreme Court held:

"We see nothing in the terms of that treaty, either in the eighth or ninth article, that could be construed as a withdrawal of lands which in fact were the public lands of the United States, although contained within the claimed limits of some Mexican grant made prior to the cession to the United States. *The mere fact that lands were claimed under a Mexican grant, when such grant did not in truth cover them, would not by virtue of any language used in the treaty operate to reserve such lands from entry and sale* (522).

* * * * * * *

"*The lands were in fact and have been since their cession to this country public lands of the United States*, although during the period between the passage of the act of 1854 and that of 1891 they were not open for sale or other disposition while the claims to such lands were undetermined (525, 526).

* * * * * * *

"Public lands belonging to the United States, for whose sale or other disposition Congress has made provision by its general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by Congressional authority or by an executive withdrawal under such authority, either expressed or implied. Wolsey v. Champman, 101 U. S. 755, 769; Hewitt v. Schultz, 180 U. S. 139 (520).

* * * * * * *

"Nor does the case of Newhall v. Sanger, 92 U. S. 761, apply. In that case it was held that lands within the boundaries of an alleged Mexican or Spanish grant which was subjudice at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the railroad were not embraced in the Congressional grant to the company. The decision went upon the ground that *the legislation of Congress* had been so shaped that no title could be initiated under the laws of the United States to lands covered by a Spanish or Mexican claim until it was barred by lapse of time or rejected. The act of *March 3, 1851*, 9 Stat. 631, §18, which provides for the presentation of claims under Mexican grants in California to the commission established by the act, was referred to by the court, and it was held that by reason of *its* provisions, the lands were not public lands under the laws of the United States until the claims thereto had been

either barred by lapse of time or rejected. The sixth section of the *act of 1853*, March 3, 10 Stat. 244, 246, was also referred to as *expressly excepting* all lands claimed under any foreign grant or title" (525). [Italics supplied.]

Lockhart v. Johnson, 181 U. S. 516, 520, 521, 522, 525, 526.

In Lane v. Watts the court repeats the holding of Lockhart v. Johnson:

"The mere fact of a claimed Mexican grant did not reserve the lands covered by it. Lockhart v. Johnson, supra. It was only after their presentation to the Surveyor-General of New Mexico for his report thereon that the lands were reserved 'until the final action of Congress.' *There was no reservation except by this statute* and it related only to lands covered by a claim presented to the Surveyor-General. *There is no language in the treaties which implies a reservation.* Lockhart v. Johnson, at p. 523." [Italics supplied.]

Lane v. Watts, 235 U. S. 17, 22.

The cases of Cameron v. U. S.; Newhall v. Sanger; and Southern Pac. v. U. S., all would have avoided pages of discussion in holding they were withdrawn by congressional act, if the mere treaty had constituted the withdrawal.

In Cameron v. U. S. the land was in fact subjudice, the Mexican title being then in question before the Congress, the Surveyor General having reported the Mexican title to Congress and the Congress failing to act upon it at the time it was claimed to be public land of the United States. The opinion holds that:

"In this case there is an express finding that the report of the surveyor general limiting the grant to four square leagues has never been finally acted upon by Congress, and that the claim and report *are still pending before Congress;* in other words, *that the claim is subjudice.*" [Italics supplied.]

Cameron v. U. S., 148 U. S. 301, 310, 311.

In Newhall v. Sanger, supra, a claim to certain land under a Mexican grant was still subjudice under the proceedings of the act of March 3, 1851, when Congress purported to grant the same lands to the Western Pacific Railway. Instead of relying upon a reservation arising from the Treaty of Guadalupe Hidalgo and extending until an adjudication of Mexican claims, it bases its decision on the congressional withdrawal by the act of March 3, 1851:

"It is unnecessary to dwell longer upon this question, or to review subsequent statutes touching the government lands in California. It suffices to say that there is nothing in any of them which weakens the construction we have given to the act of *1851.* This controversy depends upon *that act* and the Pacific Railroad acts which we have cited." [Italics supplied.]

Newhall v. Sanger, 92 U. S. 761, 765.

We can see nothing in the dicta in Quinn v. Chapman, 111 U. S. 445, 446, and U. S. v. McLaughlin, 127 U. S. 428, 454, which interprets differently Newhall v. Sanger. Certainly no theory of withdrawal by treaty was then recognized by the Supreme Court. If

such a doctrine had been established it would have been applied in Cameron v. U. S., decided seven years later, and in the several subsequent cases relying only on the withdrawal while subjudice in proceedings under statutes.

Eight years later, Lockhart v. Johnson so interprets Newhall v. Sanger as relying solely on withdrawal by the subsequent statute and not by treaty.

In Southern Pacific v. U. S., 200 U. S. 354, 357, instead of holding the lands claimed under the Mexican grant were withdrawn by the treaty, the Supreme Court opens its opinion with the sentence, "The single question is whether these lands were between the dates of the two surveys subjudice, and therefore not passing under the grant to the railroad company" (357). The Mexican grant had been held valid but the survey provided by the Land Board act had not yet determined the area. The grant to the railroad was made prior to the survey of the Mexican claim. The court held the land was withdrawn because subjudice. It does not mention the treaty, much less that it withdrew the lands and thus overrule the Lockhart v. Johnson decision, decided five years previously, and differ from the subsequent decision of Lane v. Watts.

We therefore hold that the Treaty of Guadalupe Hidalgo did not withdraw the lands on the invalid claim of Castro, and that in 1850 they were subject to the disposition of Congress by the swamp and overflow grant.

There is a serious practical objection to an overruling of Lockhart v. Johnson and Lane v. Watts. The principal occupation of Californians at the time of the cession was the grazing of livestock. In the north-central, central, and southern parts of the state there is no summer rainfall or green pasture on their uplands. The swampy lands with their green summer feed are principally located in the great central basin in the Delta and lower reaches of the Sacramento and San Joaquin rivers, and the borders of San Francisco, San Pablo, and Suisun bays. They are filled by the late spring freshets from the Sierra snows or by the brackish backwaters of the bays. Naturally, the cattle raisers seeking Mexican grants desired to have them included with the summer dry upland. The Supreme Court in Wright v. Roseberry, supra, estimates the area of California swamp and overflowed land at 2,000,000 acres. Of the claimed Mexican titles presented to the Land Board, 190 were rejected, covering approximately 3,000,000 acres. Morrow's Spanish and Mexican Private Land Grants, p. 14.

Obviously among these rejected titles was a very large area of swamp and overflowed lands which have since been acquired in private ownership from California. There has been no grant to the state except in the swamp and overflow act of 1850. While claims held invalid by the Land Board are declared in § 13 of the Act of 1851 to be "deemed part of the public domain of the United States", this does mean that they were public lands in 1850 when the swamp

land grant was made. If, as now claimed, they were withdrawn then by the treaty they were not restored to California by their rejection by the Land Board. The 1850 grant being in praesenti could not grant lands restored to the public domain.

In 1857, when a large part of the Mexican claims to California lands were still subjudice and very little of the California swamp lands had been reported to the General Land Office, Congress enacted that swamp lands selected and reported to the Land Office prior to March 3, 1857, were then confirmed. The act applied to all the states, not particularly to California. This is the only congressional confirmation of the grant of 1850.

In 1866 the question of swamp land titles in California had become more acute. Congress passed an act, 43 U. S. C. A., § 987, ordering a certification to California of all lands in approved township plants. The determination of what lands should be on such approved township surveys should be based on a report of a survey of which land was swamp and overflowed "under the grant" of 1850. If the treaty reserved the vast body of land invalid but claimed as Mexican grants it was not "under the grant" which could convey to California only public lands not so reserved.

If we were to hold that the Treaty of Guadalupe Hidalgo caused a withdrawal of all claimed but invalid titles and that they were not conveyed to the State of California, the title to them is unsettled. It is not for us to suggest what would be the status of such swamp lands if excepted from the 1850 grant to California by a treaty withdrawal such as claimed by the government. We merely point out the possible serious results in unsettling titles if the government's contention is maintained.

Appellee's prayer for the cancellation of the patents to the State of California is denied.

In response to appellants' prayer that their title be quieted against the United States, we hold that the United States has no title to the patented lands and that the title is in and quieted in appellants.

Reversed.

HAMEY, *Circuit Judge*, dissenting:

The decision in this case is important, not for the mere fact that the government has expended $2,000,000 on improvements on the land in question, but because under the doctrine of the majority opinion, none of the hundreds of Mexican grants in California are immune to attack. As the statement of facts is somewhat scattered throughout the majority opinion, I restate them for a better understanding of the case.

I. STATEMENT OF FACTS

(A) THE LAND IN QUESTION

The land in controversy was at one time designated as "swamp and overflow Land Survey No. 34." There is involved a question

as to whether or not the land is a part of Mare Island; if it is not, it is very close to the island, being depicted on most maps as a part thereof. The southern part of the island is used by the government as a navy yard. The northern part of the island, obtained by certain claimants in San Francisco Sav. Union v. Irwin (C. C. Cal.), 28 F. 708, affirmed 136 U. S. 578, was known as "Swamp and Overflow Land Survey No. 569." The southern boundary of No. 569 is the northern boundary of the land in controversy, and the southern boundary of this latter tract is about one mile south of the northern boundary. The area of the tract in question originally was 164.55 acres, but because of accretions, consists now of about 500 acres.

The western boundary of the tract is San Pablo Bay, and the eastern boundary is the Napa River. The island, including the tract involved herein, lies nearly in direction from northwest to southeast.

(B) HISTORY OF APPELLANTS' CLAIMS

By the Act of September 9, 1850, Ch. 50 (9 Stat. 452), California was admitted as one of the United States.

The Act of September 28, 1850, Ch. 84 (9 Stat. 519), provided that "the whole of those *swamp* and *overflowed* lands, made *unfit* thereby *for cultivation*, which shall remain *unsold* at the passage of this act, shall be, and the same are hereby, granted to said State" of Arkansas. Another provision of the act provided "that the provisions of this act be extended to, and their benefits be conferred upon, each of the other States in the Union in which such swamp and overflowed lands, known as designated aforesaid, may be situated." [Italics supplied.]

On June 11 and 12, 1855, one Patton, then County Surveyor for Solano County, California, made a survey of the land in controversy, as "swamp or tule" land, for one David N. Darlington. On October 10, 1856, a survey was made

"for David N. Darlington, by David P. Wade County Surveyor of Solano County through Em. A. de'Hemecourt deputy."

The survey covered the land in question and was called "Survey No. 34", and in this survey it was said:

"The whole being swamp and overflowed land to the full intent and meaning of an act of the legislature of this state entitled an act to provide for the disposal of the Swamp and overflowed land belonging to this state, passed April 28th, 1855, and surveyed in accordance with the provisions of said act and the directions of the Surveyor General of the State of California."

On March 18, 1857, the State of California issued a patent to the land in question to Darlington.

The Act of July 23, 1866, Ch. 219 (14 Stat. 218), provided that "it shall be the duty of the Commissioner of the General Land Office to certify over to the State of California as swamp and overflowed, all lands represented as such" on approved plats of township surveys made under authority of the United States.

The State of California, by an act of its legislature, approved March 27, 1872, with respect to patents theretofore issued by it, conveyed "all its right, title, and interest in and to the lands in such patents described."

One E. H. Sawyer brought an action of ejectment against the then commandant of the navy yard at Mare Island and another to recover possession of the land involved herein. Judgment was rendered for defendants because the court held that it was necessary for plaintiff to prove a legal title in himself, and as he had not shown a patent from the United States to the State of California, the legal title still remained in the United States. Sawyer v. Osterhaus (D. C. Cal.), 212 F. 765, decided February 7, 1914. In that opinion, p. 775, it is said "that the lands in suit were at the date in question, and continued to be down to a period long after their survey for plaintiff's predecessors, strictly within the definition of tide lands, as distinguished from swamp lands."

A letter dated September 16, 1914, from the Commissioner of the General Land Office to Register and Receiver at San Francisco, states that the State of California by its State Surveyor General applied for the certification to it of the land in question as "swamp and overflowed" lands on July 29, 1912. The Commissioner by this letter rejected the application for two reasons:

"1. No segregation survey of said swamp and overflowed lands, showing their location and area, has been approved. 2. If they be on Mare Island, that was in private ownership under a Mexican grant since May 20, 1841, and so was not subject to the grant made by the Act of September 28, 1850 (9 Stat. 519)."

The United States Surveyor General for California, on January 6, 1915, instructed one W. J. Lightfoot, United States Surveyor, to examine and investigate certain alleged swamp lands, and his report referred to the land in question as "swamp and overflowed." Similar instructions were given to one Francis E. Joy, on January 27, 1921, to make a report on "Lands Properly Belonging To Mare Island." His report was submitted on October 23, 1922, wherein it was said:

"The results of my investigations and observations * * * lead me to believe that there is no doubt that water at extra high tides * * * crossed over * * * [the questioned tract] and probably at ordinary high tides with a stiff wind from the southwest, but that the water crossed over the shore * * * more in the manner of an overflow, a broad sheet or spillway, without any definite channel, and only in one direction to the northeast * * *."

In 1924 the United States, in the Supreme Court of the District of Columbia, on the relation of one of the appellees herein, filed a petition to obtain a writ of mandamus against the Secretary of the Interior requiring the latter to determine whether or not the land in question was swamp and overflowed land. A writ was issued on

May 29, 1924, and in response thereto the following decision by the Secretary was made on January 10, 1925:

"From the evidence before me I am led to the conclusion that the body or strip of land known as Survey No. 34, was at the date of the swamp-land grant of September 28, 1850, swamp in character; * * * Accordingly, it is hereby declared to be swamp land, and, as such, subject to patent to the State of California in the absence of other sufficient reasons."

Thereafter, the Secretary of the Interior refused to certify the lands for patent to the State of California. On May 25, 1925, the same party in the action above outlined filed a petition for a writ requiring the Secretary to "certify said lands for patent to the State of California." The writ was granted on October 29, 1926, and the judgment was affirmed on appeal (23 F. (2d) 136), the court saying, p. 138: "the mere issuance of patent to California determines no legal or equitable right of the United States in the premises."

The patent covering this land from the United States to the State of California is dated March 9, 1928.

The appellants deraign their title from Darlington.

(C) HISTORY OF APPELLEE'S CLAIM

The Government claims title derived from a Mexican grant to one Castro.

The Congress of United Mexican States decreed on August 18, 1824, the colonization act. It provided:

"2d. The objects of this law are those national lands which are neither private property nor belonging to any corporation or pueblo, and can therefore be colonized.

"3d. To this end the Congress of the States will form, as soon as possible, the laws and regulations of colonization of their respective demarcation, with entire conformity to the constitutive act, the general constitution, and the rules established in this law.

"4th. Those territories comprised * * * within ten leagues of the seacoast cannot be colonized without the previous approval of the supreme general executive power." (Executive Document No. 17, p. 139, dated January 21, 1850; Reynolds, Spanish and Mexican Laws, 1895, p. 121.)

On November 21, 1828, the rules and regulations for the colonization of territories were promulgated. Among them were:

"1st. The governors * * * of the territories are authorized * * * to grant vacant lands in their respective territories to such * * * private persons * * * who may ask for them, for the purpose of cultivating and inhabiting them.

"2d. Every person soliciting lands * * * shall address to the governor of the respective territory a petition, expressing his name

[etc.] * * * describing as distinctly as possible, by means of a map, the land asked for. * * *

"4th. * * * The governor will accede or not to such petition, in exact conformity to the laws on the subject, and especially to the beforementioned one of the 18th of August 1824.

"5th. The grants made to * * * private persons shall not be held to be definitely valid without the previous consent of the territorial deputation, to which end the respective documents * * * shall be forwarded to it.

"6th. When the governor shall not obtain the approbation of the territorial deputation, he shall report to the supreme government, forwarding the necessary documents for its decision. * * *

"8th. The definitive grant asked for being made, a document signed by the governor shall be given, to serve as a title to the party interested, wherein it must be stated that said grant is made in exact conformity with the provisions of the laws in virtue whereof possession shall be given.

"9th. The necessary record shall be kept, in a book destined for the purpose, of all the petitions presented and grants made, with the maps of the land granted, and the circumstantial report shall be forwarded quarterly to the supreme government." (Executive Document, supra, p. 141; Reynolds, supra, p. 141.)

Jose Victor Castro, on October 30, 1840, petitioned the governor of California for a grant of "an adjacent Island in the Bay of San Francisco, called 'Mare Island', which has no owners." The next day the governor ad interim granted permission to Castro "to occupy with horses the island called la Yegna, in the Straits of Carquinez", which permission was also signed by the secretary ad interim. Subsequently Castro renewed his petition, and the following writing was made on the paper upon which the permission had been written:

"Juan B. Alvarado, duly commissioned constitutional governor of the Department of California.

"Whereas Dn. Victor Castro, a Mexican by birth, has petitioned this government for ownership of the island named la Yegu, situated near the Carquinez Straits, in consequence whereof the foregoing license was given him by Dn. Manuel Ximeno Casarin, in charge ad interim of this government, and by virtue of the fact that the petitioner has again repeated his petitions proving that said island does not belong to the ownership of any individual, pueblo, nor corporation. I have by means of a decree of this date declared, as I now declare by these presents, Dn. Victor Castro owner of the property of the said island in all its extent in conformity with the powers conferred upon me by the supreme national government.

"In consequence let this be delivered to the interested party in order that it may serve him as evidence of his title and for such other purpose as may be convenient.

"Given at Monterrey, Capital of the Department, on the 20th day of May 1841.

"JUAN B. ALVARADO."

The treaty of Guadalupe Hidalgo was proclaimed July 4, 1848. This treaty provided that the Mexican grants "preserve the legal value which they may possess, and the grantees may cause their legitimate [titles] to be acknowledged before the American tribunals." It was also provided:

"Conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories are those which were legitimate titles under the Mexican law in California * * * up to the 13th of May 1846 * * *."

One Bissell and one Aspinwall became vested with the title to whatever interest Castro had acquired by the above mentioned grant by mesne conveyances. By the Act of March 3, 1851, Ch. 41 (9 Stat. 631), a commission consisting of three commissioners was constituted "for the purpose of *ascertaining* and *settling* private land claims in the State of California." [Italics supplied.] This act provided that anyone claiming title to lands in California derived from a Spanish or Mexican grant, must within two years present his claim to the commission which must render a decision on the validity of the claim. Section 9 provided for a review of such decision by the District Court, and Section 10 provided for an appeal to the Supreme Court. With respect to all lands, the claims to which were not presented to the commission within the two year period, such lands were to be considered as a part of the public domain. A claimant, whose claim was finally confirmed, could receive a patent upon his presentation to the general land office of his certificate of confirmation "and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be finally to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same."

By Section 11 of the act it was provided:

"That the commissioners herein provided for, and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable."

Section 15 provided that the final decrees rendered, or any patent issued, under the act "shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."

The act of August 31, 1852, Ch. 108 (10 Stat. 76), provided for an automatic appeal from the decision of the commissioners to the District Court in accordance with certain conditions therein specified.

On August 31, 1852, Bissell and Aspinwall presented their claim to the land commission.

Negotiations commenced on behalf of the government on July 23, 1852, to purchase Mare Island culminated in the purchase from the

assignees of Castro, of the island for $83,491.00 by deed dated January 4, 1853, pursuant to the authority contained in the Act of August 31, 1852, Ch. 109, §3 (10 Stat. 100, 104).

The facts concerning this purchase are not disclosed in the proceedings before the commission. The first proceeding taken by the commission after the petition was presented and filed, occurred on April 20, 1854. Further proceedings were had thereafter, but the record in that proceeding discloses no evidence showing that the alleged grant was recorded in the Mexican archives. The case was submitted on briefs and taken under advisement by the commission on November 7, 1854.

On May 8, 1855, the commission delivered an opinion, stating in part:

"Strong suspicion has been raised by the testimony as to the genuineness of the grant * * *

"* * * from the facts before us we do not feel warranted in discrediting entirely the testimony of Governor Alvarado, and if any force is given to it, it must be for the full extent of his statements, and in that event, this claim must be confirmed and a decree herein will be entered accordingly."

On the same date a decree of confirmation was entered, wherein it is said:

"* * * it is adjudged by the Commission that the claim of the said petitioners is valid, and it is therefore deemed that their application for a confirmation thereof be allowed.

"The place of which confirmation is hereby given is situate in the Bay of San Francisco and is called 'Isla de la Yegue' or Mare Island, and being an Island is bounded by the water's edge."

On February 1, 1856, notice of appeal to the District Court was filed, and on March 2, 1857, the District Court entered its decree, which is unsigned, affirming the decision of the commissioners that the grant "is a good and valid claim and that the said claim be, and the same is hereby, confirmed to the said 'Isla de la Yegua' or 'Mare Island' with its natural boundaries."

On April 1, 1857, a minute order allowing an appeal to the Supreme Court was made, and thereafter during that year (the day and month not being disclosed) the parties stipulated that such appeal be vacated "and that claimants have leave to proceed under the decree of this court heretofore rendered in their favor, as under Final Decree." A minute entry of an order of the District Court referring to the same matter uses language identical to that above quoted. Both minute orders are unsigned.

On April 15, 1930, a decree nunc pro tunc was entered in the District Court, stating, among other things—

"That the said claim be, and the same is hereby, confirmed to the said 'Isla de la Yegua' or 'Mare Island' with its natural boundaries."

(D) THE ISSUES

On November 24, 1930, appellee filed its bill alleging that a grant was made by the instrument hereinabove referred to; that the grant was confirmed by a decree of the Land Commission; that on petition for review the lower court ordered judgment to be entered on March 2, 1857; that the decree of the lower court was entered on April 15, 1930; and that appellants are bound by the decree, because they claim under and in privity with appellee against whom the decree was rendered. The facts concerning the purchase of the land in question for $83,491.00 were alleged, as were the reservations, and the occupation of the lands in question by appellee since September 16, 1853.

The bill further alleged the issuance of the Darlington patent; that appellants claim some title and right to the land in question by virtue of mesne conveyances; and that "each of said claims is wholly without right or foundation in law or fact"; that appellee issued a patent to the State of California, but that the same "is null and void and is without force and effect and has no validity." Appellee prayed that the patent issued to the State of California, the patent issued by the latter to Darlington, and the mesne conveyances mentioned be declared void, and the same be surrendered for cancellation; that appellants be adjudged to have no title or interest in the lands in question, and that appellee be adjudged to be the owner in fee simple absolute, and possessed of the lands in question.

Appellants answered, alleging generally that the Castro grant was void and never finally confirmed, and that appellee had no right, title, or interest in the land in question because the patent to the State of California and the Darlington patents were valid.

The Court decreed in favor of appellee, from which this appeal was taken.

(E) QUESTIONS PRESENTED

The mere fact that appellee issued a patent does not conclude an attack against it, for, as said in Steel v. Smelting Co., 106 U. S. 447, 452, that if the lands covered by the patent "never were the property of the United States, or if no legislation authorized their sale, or if they had been previously disposed of or reserved from sale, the patent would be inoperative to pass the title, and objection to it could be taken on these grounds at any time and in any form of action." The reason for such rule is found in Davis's Administrator v. Weibbold, 139 U. S. 507, 509, where it is said that such patents—"are conclusive in such actions [referring to actions of the land department] of all matters of fact necessary to their issue, where the department had jurisdiction to act upon such matters and to determine them; but if the lands patented were not at the time public property, having been previously disposed of, or no provision had been made for their sale, or other disposition, or they had been reserved

from sale, the department had no jurisdiction to transfer the land, and their attempted conveyance by patent is inoperative and void, no matter with what seeming regularity the forms of law have been observed."

And in United States v. Conway, 175 U. S. 60, 68, it is said that "nothing is better settled by this court than that a patent issued by the United States to lands which they do not own is a simple nullity", citing cases.

In the light of the pleadings, then, it is apparent that our first inquiry is directed to the question as to whether or not the United States owned the lands in question at the time of the conveyance thereof to the state. We may assume that such conveyance occurred, if at all, at the time of the enactment of the Swamp Act, for if it did not own the lands at that time, the state acquired nothing. I believe this is conceded by both parties. The majority likewise agree, for it says that if the land was granted to Castro in 1841, "the United States did not acquire these lands from Mexico in the cession of area now constituting the State of California, and hence they were not granted to California by the Act of 1850."

In determining whether or not the lands in question were owned by appellee at the time of the enactment of the Swamp Act, it is alleged that the prior grant to Castro was confirmed by the Land Commission and by the District Court. The answers, taken in connection with contentions of appellants, present three issues: (1) Was there a decree of confirmation actually entered? (2) If so, was it valid? (3) If so, is it binding on appellants?

II. Confirmation of the Castro Grant

(A) Decree of Confirmation was Entered

It is conceded that the Commission entered and signed the decree mentioned. No reason appears why the rendition of the decree of the District Court on March 2, 1857, was not made, except that such decree was unsigned. I see no reason why that decree is invalid. I find neither statute nor decision which requires the judge to sign a decree in the federal court. 33 C. J. 1212, § 152; 15 R. C. L. 585, § 21; and see Secombe v. Steele, 61 U. S. (20 How.) 94, 102. Nothing in Equity Rule 3 requires it. The act creating the Land Commission says in § 10 that "The District Court shall proceed to render judgment" but nothing requires the judgment to be signed. It therefore appears that the nunc pro tunc decree did nothing more than was already done.

However, since the parties have made no point of it, I do not need to rest the conclusion that the Castro grant was in fact confirmed, on the point just mentioned, for the decree of the Commission is conclusive until vacated. Beard v. Federy, 70 U. S. (3 Wall.) 478, 492. Cf. Central National Bank v. Stevens, 169 U. S. 432, 459.

We must, therefore, accept the conclusion that the grant was in fact confirmed under either theory mentioned.

(B) VALIDITY OF THE DECREE OF CONFIRMATION

First. It is not contended that the decree is void because the Commission did not have jurisdiction over the persons of the claimants, and the United States, and no such contention could be made, for the claimants and the United States submitted to the jurisdiction of the Commission and the District Court.

Second. Appellants originally contended that the decree was void because it was rendered on insufficient evidence, in that there was no evidence before the Commission that the Castro grant was recorded in the archives of Mexico, or for other reasons requiring proof by evidence. This contention is disposed of by the following quotation from Beard v. Federy, supra, 489:

"The board having acquired jurisdiction, the validity of the claim presented and whether it was entitled to confirmation were matters for it to determine, and its decision, however erroneous, cannot be collaterally assailed on the ground that it was rendered upon insufficient evidence. The rule which applies to the judgments of other inferior tribunals applies here—that when it has once acquired jurisdiction its subsequent proceedings cannot be collaterally questioned for mere error or irregularity."

Further, whether or not the grant was valid is a conclusion of law to be drawn from the facts. After the term at which a judgment or decree was rendered has expired, such judgment or decree, except on appeal therefrom, cannot be set aside upon the sole ground that it is erroneous as a matter of law. The Bank of The United States v. Moss, 47 U. S. (6 How.) 31.

On rehearing, appellants concede the correctness of that holding by saying: "We readily admit that, except upon direct appeal, a decree of confirmation may not be questioned because of any inadequacy of the evidence upon which it is based."

Third. Appellants also contended that upon purchase of the Bissell and Aspinwall claim prior to determination thereof by the Commission the controversy ended, and so none was pending when the Commission entered its decree.

There are two answers to that contention: the Commission had jurisdiction, after presentation of the claim, regardless of whether or not a controversy existed; and there was in fact a controversy.

The act creating the commission begins with the statement "That for the purpose of ascertaining and settling private land claims in the State of California * * *" The only purposes of the act were stated to be "ascertaining * * * private land claims" and "settling private land claims." Thus the jurisdiction of the Commission was extended to the problem of ascertaining what grants were in existence. Ascertaining what grants were in existence was important to the United States in regard to the newly acquired lands, as shown by More v. Steinbach, 127 U. S. 70, 81, and Newhall v. Sanger, 92 U. S. 761, 763, et seq. It is obvious that grants could be

ascertained without the existence of a controversy, and that, therefore, its jurisdiction did not depend on the existence of a controversy.

The majority now holds that the duty thus stated "was to ascertain and settle it as between two adverse parties." It says that such a conclusion follows from certain provisions of the act. That the provisions do not state expressly that such is the fact, is shown by a perusal of them. That the provisions contain no such meaning by implication, is shown by the fact that they, on their face, relate to cases where there was in fact a controversy.

The second reason why the contention of appellants is unsound is that there was in fact a controversy. The officers of the United States were required to be present at all hearings before the commissioners. Even in the case of perfect grants, such officers had the duty to prevent encroachment on the public lands by claimants under their grants or, in other words, to see that the claimants did not claim more than actually belonged to them. Appellants on rehearing deny the application of that statement saying: "Surely it will not be contended that the United States had a controversy with itself to prevent its claiming as against itself more land than it was entitled to." From this, I understand that it is argued that officers of the United States may violate duties imposed by statute whenever their judgments so dictate. I do not understand that to be the law. The statute prescribes the duty as stated, and all the wisdom appellants may muster cannot controvert it. It is for Congress to prescribe the duty, not appellants. The presumption is that the officers performed their duty, and appellants have not overcome it.

A further reason why there was in fact a controversy is that even at the time of the decree of the land commissioners, the United States under the theory of the majority, that the land was conveyed to California, still held the legal title because no patent had been issued. Michigan Land & Timber Co. v. Rust, 168 U. S. 589. Therefore there was a contest between the holder of the legal title against persons claiming it. It was exactly so held in Sawyer v. Osterhaus, supra, and the decree in that case is res judicata because appellants claim under the plaintiff in that case, and are in privity with him. Dowell v. Applegate, 152 U. S. 327, 343; Litchfield v. Goodnow, 123 U. S. 549, 550.

Fourth. The majority holds that appellee was trustee for California at the time of the decree of the Commission, and that it violated its duties as trustee in haphazardly or perfunctorily contesting the Castro claim to the detriment of the cestui, and therefore appellee "can take no advantage from the proceeding before the Commission."

That argument is based on the assumption that actually the equitable title passed only if the land was public at the time the swamp act was passed. And to determine that question, one must first determine whether the decree of the Land Commission can be attacked, because if not, California received no interest whatever. The holding is analogous to the homely examples of the cart pulling the horse, and crossing the bridge before it is reached. Attaching the word "equity"

to a court does not permit it to transmit power to the cart to pull the horse nor does it permit the bridge to be crossed before it is reached.

The fallacy in the holding of the majority is that the grant is attacked without first considering whether or not the decree is subject to attack, and once having successfully attacked the grant, the result thereof is the establishment of an equitable title, which is then used as a basis for an attack upon the decree. But the existence of the equitable title arises from a successful attack on the decree. Such reasoning, in my opinion, has neither beginning nor end.

That is what I said in the original dissent, and it is now applicable. Appellants, on rehearing, erroneously state:

"The dissenting opinion conceives that the majority opinion reasons in a circle, the argument in this connection being this: that the confirmation proceedings cannot be attacked, except by one having an equity in the property; that the majority assume that the United States held the legal title in trust for the State under the Swamp Land Act and that therefore the appellants, as successors in interest, may question the confirmation proceedings; whereas, so it is urged, until the confirmation proceedings are disposed of no equity in the State is shown which would give it, or appellants as its successors in interest, any standing to attack the proceedings."

Nowhere did I state that "one having an equity in the property" could attack the confirmation proceedings. In fact, the statement is untrue. One might own an equity under a claimant before the Commission, but under § 15 of the act he could not attack the confirmation proceedings.

The majority answer this argument by saying:

"* * * Implicit in this bill, so recognizing the patents which it seeks to cancel, is the recognition of the status of the United States as holder of the bare legal title in 1850, at the time of the grant to California, in trust for California as its cestui, having the whole equitable interest."

Let us see what the bill recognizes. After alleging the issuance of the patent by appellee to appellants, it is alleged that such patent

"* * * is null and void and is without force and effect and has no validity for the reason that the lands described in said purported patent were claimed and held in private ownership under and by virtue of the aforesaid grant from the Governor of Mexico at the time of the passage and approval of the above mentioned Swamp Land Act and were not a part and never had been a part of the public domain * * *."

Several other reasons were alleged in the bill as grounds for the allegation that the patent was void. I am unable to agree with the majority holding with respect to this specific matter in view of such allegations.

Appellants on rehearing offer the following observation with respect to my conclusion that the majority reasoning was circuitous:

"This line of argument, we respectfully suggest, wholly misconceives the position of appellants. They are not claiming that, because the Government held the legal title in trust for the State, they are free to attack the confirmation proceedings. *Appellants are not in any true sense attacking those proceedings at all.* Their claim is merely that those proceedings, be they good or bad, are not binding upon them * * *." [Italics supplied.]

These statements were either made erroneously or appellants now wish to change the theory heretofore urged. Proof of my statement is found in appellants' briefs, where I find nearly 15 pages devoted to an attack upon the decree of confirmation. In their brief they say: "We submit, upon the grounds stated, that the decree of the Land Commission was and is void, and upon the same grounds the nunc pro tunc decree was and is void"; "We need not pause to inquire the effect on the Castro claim of the void decrees"; and in the Resume: "It results, therefore, that on each of the grounds stated the Land Board, and equally the District Court, was without jurisdiction or power to confirm the Castro grant, and being so without power or jurisdiction the decrees, respectively, of the Land Board and the District Court are nullities." A similar statement is made in appellant's reply brief.

The point herein under discussion was not originally made by appellants. It seems to me from the above quotation that appellants disclaimed any intention of relying upon it in their petition for rehearing. If not, however, the fact that the reasoning is circuitous shows the fallacy in the argument, and I believe the correct conclusion is that it is untenable.

Fifth. As the case is presented to us, there is a presumption of validity of the decree of confirmation, and the burden is on appellants to overcome that presumption. I believe the foregoing discussion shows that none of the points raised are tenable; that therefore the Commission and the District Court had jurisdiction over the persons of the claimants and appellee, and over the subject-matter; and that therefore the decree is valid.

(C) EFFECT OF THE DECREE OF CONFIRMATION

Having established the validity of the decree of confirmation, I next consider its effect. Under § 13 of the act creating the commission, it is provided that "for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant" upon compliance with certain procedural conditions. With respect to claims finally rejected, and those not presented to the Commission within two years, it is provided that the lands so claimed shall be considered a part of the public domain.

In § 15 it is provided:

"* * * That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."

First. That a grant once finally confirmed, as here, was to be protected against such forays as the one here presented, seems to have been definitely settled.

In Beard v. Federy, 70 U. S. (3 Wall.) 478, 492, involving the validity of a Mexican grant in California, it is said:

"* * * If parties asserting interests in lands acquired since the acquisition of the country could deny and controvert this record and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. The patentee would find his title recognized in one suit and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests, or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rest would be open to contestation. The intruder, resting solely upon his possession, might insist that the original claim was invalid, or was not properly located, and, therefore, he could not be disturbed by the patentee. No construction which will lead to such results can be given to the 15th section * * *."

In Thompson v. Los Angeles F & M Co., 180 U. S. 72, 76, it is said:

"* * * The ultimate basis of the contention is that the court of private land claims had no jurisdiction to confirm the grant because the governor of the Californias had no power to convey the public land for a money consideration. That is to say, the grant being void it could not be the basis of a claim to lands 'by virtue of any right or title derived from the Spanish or Mexican government' * * *.

"We think that counsel put too limited a significance on the words of § 8, that the claim shall be 'by virtue of any right or title derived from the Spanish or Mexican government.' The words, of course were descriptive of the class of claims of which the board of land commissioners was given jurisdiction. They made a special tribunal of the board, limited to hear a particular class of claims, but not limited to the questions of law and fact which could arise in passing on and determining the validity of any claim of the class. The power to consider whatever was necessary to the validity of the

claim—propositions of law or propositions of fact, the fact of a grant, or the power to grant—was conferred. If there should be a wrong decision the remedy was not by a collateral attack on the judgment rendered. The statute provided the remedy * * *. The jurisdiction of the board was necessarily commensurate with the purposes of its creation, and it was a jurisdiction to decide rightly or wrongly. If wrongly, a corrective was afforded, as we have said, by an appeal by the claimant or by the United States to the district court * * *."

These quotations seem to be decisive of the instant case. It is urged that there are two reasons why the rules therein stated are not applicable. Those will be considered next.

Second. Appellants for the first time have, on rehearing urged a new point which the majority, in its amended opinion, has held to be well founded. I quote from appellants' brief on rehearing:

"* * * appellants assert that, whatever the form, the fact of the matter is that the United States did not represent the State, for the reason that the interests of the United States were hostile and adverse to those of the State, and one who has an adverse interest cannot represent those to whose interests his own are hostile. The fact cannot be gainsaid that upon purchasing the interests of Bissell, Aspinwall and McArthur the United States was the only real party in interest on both sides of the proceeding * * *."

Under those facts it is said that the applicable law is that a decree given in a proceeding in which the real party in interest on both sides is the same, is "not binding upon any one other than the actual parties to the proceeding."

Assuming, without holding, that the rule as stated by appellants is correct, as applied to courts deriving their power from the Constitution, I explore the contention further to demonstrate its unsoundness.

The treaty of Guadalupe Hidalgo provided that "grantees may cause their legitimate [titles] to be acknowledged before the *American tribunals*." [Italics supplied.]

The following quotation from United States v. Ferreira, 54 U. S. (13 How.) 39, 45, respecting a somewhat similar treaty provision, is applicable:

"The treaty certainly created no tribunal by which these damages were to be adjusted, and gives no authority to any court of justice to inquire into or adjust the amount which the United States were to pay to the respective parties who had suffered damage from the causes mentioned in the treaty. It rested with Congress to provide one, according to the treaty stipulation. But when that tribunal was appointed it derived its whole authority from the law creating it, and not from the treaty; and Congress had the right to regulate its proceedings and limit its power; and to subject its decisions to the control of an appellate tribunal, if it deemed it advisable to do so."

In accordance with that principle the nature of the obligation under the present treaty is shown by the following from Beard v. Federy, 70 U. S. (3 Wall.) 478, 492:

"* * * * The obligation, to which the United States thus succeeded, was of course political in its character, and to be discharged in such manner and on such terms as they might judge expedient. By the act of March 3d, 1851, they have declared the manner and the terms on which they will discharge this obligation * * *."

And more specifically, it is stated in Grisar v. McDowell, 73 U. S. (6 Wall.) 363, 379:

"* * * * In the execution of its treaty obligations with respect to property claimed under Mexican laws, the government may adopt such modes of procedure as it may deem expedient. It may act by legislation directly upon the claims preferred, or it may provide a special board for their determination, or it may require their submission to the ordinary tribunals. It is the sole judge of the propriety of the mode, and having the plenary power of confirmation it may annex any conditions to the confirmation of a claim resting upon an imperfect right, which it may choose. It may declare the action of the special board final; it may make it subject to appeal; it may require the appeal to go through one or more courts, and it may arrest the action of board or courts at any stage."

This quotation was approved in Trenouth v. San Francisco, 100 U. S. 251, 255. See also: Astiazaran v. Santa Rita Mining Co., 148 U. S. 80, 81. It was held in Grisar v. McDowell, supra, where a claim was confirmed by the circuit court on appeal from a decree of confirmation made by the commission, and Congress thereafter confirmed the claim and modified the decree of the circuit court while appeal to the Supreme Court was pending, that the action of Congress was conclusive, and that the Supreme Court had no power to and could not affect the grant by its decision.

From these authorities I believe it is apparent that the discharge of the duties placed on the United States by the treaty was, in the first instance to be carried out by Congress. Congress performed the duties by establishing the land commission, and providing that when that tribunal made a decision with respect to a particular claim, the decree so made "shall be conclusive between the United States and said claimants." And as subsequently held by the Supreme Court, if the decree was conclusive upon those parties, it was equally conclusive on those who claimed under such parties. Congress has specified the condition, as it had the power to do, and we must give effect to that condition as it is written, without restricting or enlarging it. Reading into the provision quoted the effect of the decision of the majority we would then have the act read in effect: "The decree shall be conclusive between the United States and said claimants, excepting when made in proceedings where one party is the real party in interest on both sides."

I am content to let Congress pass the legislation and believe there is no authority in this court to usurp that function. Congress itself confirmed grants in New Mexico under the same treaty. (Act June 21, 1860, Ch. 167, 12 Stat. 71.) I am doubtful if even appellants would contend that such action of Congress could be held to be not binding on the ground of the exception herein proposed. Tameling v. United States Freehold, etc., Co., 93 U. S. 644, 662; Astiazaran v. Santa Rita Mining Co., supra. It is difficult to see how a decree of the commission, acting on behalf of and pursuant to authority conferred by Congress, can be held not binding on the same ground, since Congress did not so provide in the act.

With respect to the grants in California, Congress delegated its duty to a special commission. Although that commission is more in the nature of a Congressional Committee, some of the cases speak of it as exercising judicial functions. Statements in Astiazaran v. Santa Rita Mining Co., supra, imply that the commission was a court. Concede that fact, and it is still apparent that the authority of the court was only that given to it by the act of its creation; that it could confirm or reject grants only in the manner prescribed by the acts; that it did not function as a court with plenary powers, and was not intended as such. I believe that the foregoing conclusively shows that the confirmation by the commissioners was, except as to "third persons", to have the same effect with respect to attack such as this, as a confirmation by Congress, which, as the Supreme Court said in Tameling v. United States Freehold, etc., Co., supra, 662, was "conclusive, and therefore not subject to review in this or any other forum."

Third. It was originally contended by appellants that appellants were "third persons" within the meaning of § 15 of the act. The majority so held, but did not consider the complete statute.

Section 15 provides that "the final decrees rendered * * * shall be conclusive between the United States and said claimants only, and shall not affect the interests of third persons." It is quite clear from the statute that neither the United States nor the claimants can be "third persons." And it likewise means that all persons claiming under either the United States or the claimants are concluded, for in Beard v. Federy, supra, 492, speaking of the patent which follows the decree of confirmation, it was said: "As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent * * *." See also More v. Steinbach, supra, 83. In fact, that is merely the general principle prevailing in all suits to quiet title, that the decree concludes the parties and their privies. See Dowell v. Applegate, supra, and Litchfield v. Goodnow, supra. When the statement quoted from Beard v. Federy, supra, is read in connection with the statement appearing in the same paragraph, it is apparent that the only persons who could "hold superior titles, such as will enable them to resist successfully any action of the govern-

ment in disposing of the property" are those who claim under some title not descending from either the United States or the claimants. Here appellants claim under the United States and are concluded by the decree.

On rehearing, appellants concede that such contention is unsound law, saying:

"Nor is it our contention that, in the ordinary sense, the State of California and its successors in interest are 'third parties' within the meaning of Section 15 of the Land Commission Act. Were that question still open, we think it could be demonstrated that the State of California and these appellants were intended by Congress to be regarded as 'third persons' whose interests should not be affected by proceedings in confirmation. * * * But we concede that it has been decided otherwise by the Supreme Court in regard to this particular statute * * *."

Notwithstanding this concession, the majority on rehearing reiterates its holding, though on other grounds. In Lord v. Veazie, 49 U. S. (8 How.) 250, an action was brought on a covenant in "a written instrument, which purported to be a conveyance by Veazie to Lord of 250 shares of the stock of" a railroad company. The railroad company, chartered by the State of Maine, had executed a deed to a bank, "by virtue of which the bank claimed to hold the entire property of the" railroad company. Veazie by the written instrument covenanted that the property of the corporation was free and clear of encumbrances, and that the stockholders thereof had a right to use certain river waters, which, it was shown, was granted by the State of Maine to Moor and others. In the Supreme Court, Moor for himself and as counsel for the bank moved "to dismiss the appeal, upon the ground that it was a fictitious case, got up between said parties for the purpose of settling legal questions upon which he [and the bank] had a large amount of property depending." The motion to dismiss was sustained, the court saying, p. 255:

"* * * The objection in the case before us is, not that the proceedings were amicable, but that there is no real conflict of interest between them; that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be."

Based on this case, the majority say that "it would require an unequivocal decision of the Supreme Court to establish that California was not intended by Congress to be included in the phrase 'interests of third persons' used in the Land Board Act of 1851." It is sufficient to point out that the case relied on did not construe the phrase in the act mentioned, because that case dealt with an ordinary action at law, and was decided two years before the act in question was enacted. In Beard v. Federy, supra, and More v. Steinbach, supra, the phrase was construed as used in the act in question. The construction so given is opposite to the one used by the majority, and is controlling.

(D) TIME WHEN CONFIRMATION TAKES EFFECT

In More v. Steinbach, 127 U. S. 70, 83, it is said:

"* * * The confirmation takes effect, by relation, as of the date of the first proceeding commenced before the land commissioners; and an adjudication that at that date it was valid is also an adjudication that it was valid at the date it was mde * * *."

As applied to the instant case, the Castro grant was made in 1841, and therefore the land covered thereby was not ceded to the United States as public land by the Treaty of Guadalupe Hidalgo. It follows that instead of the State of California receiving an equitable title under the Swamp Act of 1850, it, in my opinion, received nothing, which is the title appellants now have.

III. The Evidence

(A) COPY OF GRANT FROM DEED RECORDS

Appellee introduced into evidence a certified copy of the grant as recorded in the deed records of Sonoma County, California. The majority held such copy inadmissible because under California law "a certified copy of a document which is recorded in a county other than that where the land lies is not admissible."

In addition appellee introduced the record of the proceedings before the Commission in the Bissell case, as filed in the District Court. A copy of the grant was included in that record. Inasmuch as I believe the latter copy was admissible, it is unnecessary to discuss the holding of the deed record copy.

(B) ADMISSIBILITY OF THE BISSELL RECORD

The majority holds that the entire record in the Bissell case is inadmissible in the instant case, for the same reason it holds the decree not binding on appellants. I have heretofore discussed those reasons, and I believe, shown them to be untenable, and therefore such record is admissible.

(C) COPY OF GRANT FROM THE BISSELL RECORD

Appellee opened its case with testimony of the loss of papers and records.

Witness Iva Frances Bailey testified on behalf of appellee, as follows:

"I am an employee in the office of the United States Surveyor General for California and have been there for thirty-seven years. Prior to the San Francisco earthquake and fire in 1906, there was in the possession and in the custody of that office the records and archives of the Mexican Government of California, also the records of land claims under Spanish grants presented to the Land Com-

mission in California. I understand that all original papers connected with the grant were also on file in the office. The effect of the fire of 1906 was a total destruction of all of these papers with the exception of a few that were in the safe."

Witness Frank E. Barker testified on behalf of appellee, as follows:

"I am the office cadastral engineer in the Office of the Public Survey, which was formerly the United States Surveyor General for California. I have been there since 1909. I have had occasion to make a search through the archives of the Mexican Government prior to the acquisition of California by the United States and have found some of them. The proceedings before the Land Commission in the case of the confirmation of Mare Island I have been unable to find. There appears to be an incomplete expediente on the original documents that were submitted as exhibits to the Land Commission at the time of the application for confirmation. I do not find the original document of the grant from Juan B. Alvarado to Castro, * * *."

The majority stated, in its opinion, with respect to the Castro grant: "No original document was offered by the government or its absence explained. There is absence of search or proof of loss."

Ordinarily the original grant would have been in the possession of the land commission after the hearing. To show that the original grant was presented to the commission, I quote from its opinion confirming the grant:

"The claimants in this case ask confirmation of their title which they derive from Victor Castro, by virtue of a grant issued to the said Castro, on the 20th day of May 1841, by Governor Juan B. Alvarado, and have offered in evidence in support of their claim the *original grant* to the said Castro * * *." [Italics supplied.]

There are also numerous other references in the record of the proceedings before the land commission showing that the original grant was "filed" with it.

Upon completion of its work, the land commission deposited its records in the office of the Surveyor-General. The act of May 18, 1858, Ch. 39, § 1 (11 Stat. 289), made it the duty of the Secretary of the Interior to cause to be collected and deposited in the same office, "all official books, papers, instruments of writing, documents, archives * * * that may be found in the unauthorized possession of any individual * * *." By the same act the Surveyor-General was required to safely keep such documents. The presumption is that the officers performed their duties. In the absence of proof to the contrary, we must presume that the original grant was in the possession of the Surveyor-General of California.

This is sufficient to show, that if we consider the record of the proceedings before the Land Commission, filed with the District Court, the original grant was in fact filed with the Commission. On the other hand, if we do not so consider such record, then we

must presume that it was in the hands of the Surveyor-General, so that under either theory the Surveyor-General did in fact have the original grant. The evidence quoted shows the loss or destruction thereof. In view of what has been said, there seems to be justification for the suggestion that the statements quoted from the original majority opinion were improvidently made.

As amended on rehearing, the majority holds that the copy of the grant in the Bissell record is inadmissible because: (1) "all the authorities are agreed that a thorough search for the original must be made" in order for a copy of an ancient document to be admissible, and "no such search was proved to have been made by the government in this case"; and (2) it does not appear from the record of the Bissell case "that there was any deposit or recordation in the public archives of the Republic of Mexico of the claimed grant to Castro."

With respect to the majority holding that the copy of the grant in the Bissell record is inadmissible because there was no proof of a thorough search for the original, the testimony quoted, I believe, shows the contrary.

With respect to the second holding that there must be proof of recordation of the grant in the Mexican archives, I believe the majority has confused this suit with a proceeding before the Land Commission. In the latter, such recordation should be shown. But after action by the Commission on the claim presented, and its final affirmance, the parties cannot thereafter in a separate suit require proof of such facts. If such proof were required it would be contrary to Beard v. Federy, supra, and Thompson v. Los Angeles F. & M. Co., supra. It is there shown that if a patent is issued pursuant to a decree confirming a grant, it is that "record" which is conclusive, or in other words, parties rely on their patents. Here, of course, there was no necessity for appellee to issue a patent to itself. Under such circumstances, I doubt that the original grant, or a copy thereof, need be shown in a separate suit, such as this. No reason appears why the decree itself should not be sufficient.

IV. Property Covered by the Grant

The Castro grant conveyed the "island in all its extent." The question arises as to whether this description is sufficient to cover the land in question.

It has been mentioned that the Sloat Board commenced negotiations for the purchase of the island on July 23, 1852. The next day in reply to the letter from the Sloat Board, Bissell answered that he would sell his interest in the island at "$250 Two hundred & fifty dollars per acre, for that portion of the 'Island' lying south of the main body of the tule or low ground and $50 Fifty dollars per acre for that portion lying north of the high or dry land, the first supposed to contain about nine hundred acres and the last about thirteen hundred acres." On July 7, 1852, Bissell offered to sell "the whole

Island" for $160,000. The contract entered into between the owners and the government dated December 10, 1852, described the property to be conveyed as:

"* * * Mare Island * * * including all the tule or low land and marsh belonging to the same, or which has ever been reputed or claimed to belong to the same * * * and all privileges, rights, or claims to the waters, harbors, and creeks supposed or claimed to belong to the same tract known as Mare Island."

On December 13, 1852, the Secretary of the Navy wrote the Sloat Board asking their estimate of the value of Mare Island "with all its appendages." On the same date, this board advised the Secretary the amount of their estimate, stating that "the Island including the tule opposite Vallejo contains about nine hundred acres in addition to a large tract of tule" which description included the land in controversy.

The actual deed, dated January 4, 1853, described the property as:

"Mare Island in the Bay of San Pablo, as recently surveyed by the board of officers of the United States sent to California for the selection of a site for the Navy Yard there, including all the Tule or low land and March belonging to the same or which has ever been reputed or claimed to belong to the same * * *."

On February 9, 1853, the Secretary of Navy wrote the President stating that he was contemplating the selection of Mare Island as the site of the Navy Yard and Naval Depot in pursuance of the act of August 31, 1852, Ch. 109, § 3 (10 Stat. 100, 104); that "Negotiations have been in progress for the purchase of this island and its appendages for some time past"; that there was some doubt as to whether or not the United States did not at that time own title to the land, and theretofore requested the reservation of

"Mare Island, together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island * * *."

On February 11, 1853, the President made the reservations recommended, and the following day the Secretary of Navy advised the Secretary of the Interior of the reservation, describing the land in the identical language quoted. This last letter was answered by the Commissioner of the General Land Office, on February 16, 1853, advising that the order of reservation had been duly recorded in his office.

The opinion of the Attorney-General, of April 9, 1853, said:

"I am satisfied that the State of California may set up, and probably maintain, title, as against the United States, to so much of Mare Island as is subject to overflow by water, whether periodically or otherwise; that is, at least, to all below high water mark."

A decree of confirmation by the Commission on May 8, 1855, confirmed the grant to Mare Island, describing it as "an Island is bounded by the water's edge." The unsigned decree of the District Court,

March 2, 1857, confirmed the grant to Mare Island "with its natural boundaries."

The land in controversy was shown as a part of Mare Island in the Dyer Survey, approved by the United States Surveyor General of California, on September 17, 1863.

On September 17, 1873, the chief of the Bureau of Yards and Docks, Navy Department, acting under authority of the Secretary of Navy, appointed a board of civil engineers to present a plan for the development of the navy yard at Mare Island.

The commandant of the Navy Yard, Mare Island, wrote the Chief of the Bureau on September 26, 1873, that "Mare Island" included the land here in controversy.

The board thus appointed, on September 17, 1873, made its report on November 19, 1873, from which we quote:

"The extreme length of this island, including a large tract of tule on the northern side, and extending toward Napa and Sonoma, is about 10 miles, and its average width, including tule, about three-quarters of a mile.

"The area of upland is 741 acres, and of the tulelands on the east side, which will be available for yard purposes, is 135 acres.

"No accurate measurement has been made of the area of the tule on the northern side, but an approximate area is 3,973 acres * * *.

"Soon after our arrival the commandant of the yard * * * informed us that a question had been raised as to the validity of the title held by the United States to the tract of tule on the northerly side of the island * * *."

The Commandant of the Mare Island Navy Yard advised the Register at Sacramento, California, on November 24, 1873, that the United States claimed the land here in question, and likewise advised the Board of Supervisors of Solano County, California, by letter dated the following day.

The United States Surveyor-General instructed one Freeman to make a survey of Mare Island (in accordance with the Act of July 1, 1864, Ch. 194, 13 Stat. 332), on July 19, 1877. Freeman made his survey thereafter, showing the land in question, and the area of Mare Island as 5,337.22 acres. Notice that the survey had been made was published in accordance with the act. On July 5, 1879, an attorney for the then alleged owners of the land in controversy protested against the Freeman Survey to the Surveyor-General, and on July 16, 1879, protested likewise to the Commissioner of the Land Office. On August 7, 1879, the Surveyor-General forwarded the Survey to the Commissioner, saying that the survey should be limited to the lands lying south of those in controversy, and:

"I consider the survey incorrect in that it not only includes tracts which are properly islands in themselves but also embraces a large quantity of tide lands * * *."

It does not appear that the Freeman survey was approved by the Commissioner as provided in the Act. Evidence was also introduced to show that one E. H. Sawyer (referring to Sawyer v. Osterhaus, supra) was, at the time the letter of the Surveyor-General was written, the corresponding clerk who wrote the letter.

On December 22, 1883, the Chief of the Bureau of Yards and Docks advised the Secretary of the Navy that "Mare Island" included the "tule" or "swamp" land in dispute.

In a corrected report of Spanish and Mexican Grants in California complete to February 25, 1886, prepared by the State Surveyor-General "G. W. P. Bissell et al." are shown as "confirmee" of Mare Island, the area of which is shown to be 5,527.22 acres.

In San Francisco Sav. Union v. Irwin (decided July 8, 1886), supra, it is indicated that the land in question was not covered by the grant.

In Sawyer v. Osterhaus, supra, decided February 7, 1914, it is said that the land in controversy "is physically a part of the body of land officially known and designated as 'Mare Island.'"

The Commissioner of the General Land Office wrote the Register and Receiver at San Francisco on September 16, 1914, regarding certification to the State of California of certain swamp lands on Mare Island, saying that "As the whole of the island was granted to Castro, such a description would include the lowland or the tule and marsh, as well as the high or uplands."

United States Surveyor Lightfoot, acting under instructions of the Surveyor-General, dated January 6, 1915, made his report of examination and investigation of alleged "Swamp and Overflowed" land and extent of Mare Island that the land in question was a part of Mare Island.

Francis E. Joy, United States Cadastral Engineer, acting under instructions of United States Surveyor-General, dated January 27, 1921, made his report on "Lands Properly Belonging To Mare Island", on October 23, 1922. His opinion seemed to be that the lands in question were tidelands, and his plat sent with the report was not accepted and was ordered revised. The revised plat was accepted on November 8, 1923, and shows the land in question as a part of Mare Island.

One of the appellants herein brought suit in the District of Columbia against the Secretary of the Interior, in which suit on May 27, 1924, a peremptory writ of mandamus was issued directing the Secretary to decide whether the land here in question was or was not "swamp land" on September 28, 1850. On January 10, 1925, the Secretary decided that such lands were swamp in character, and "that it was above ordinary high-water mark and formed a contiguous body attached to the higher portion of Mare Island."

On February 12, 1925, the Secretary of the Navy wrote the Secretary of the Interior concerning this land, and, after outlining certain facts, said:

"From the foregoing it seems clear that the grant to Victor Castro of Mare Island 'in the entire extent' included all of the tule lands which physically formed an integral part thereof. If it had been intended to eliminate the tule lands from this grant, such sweeping language would not have been used. The words 'in the entire extent' clearly indicate that it was intended to grant all lands which in any way were connected with and formed part of Mare Island."

Many maps were introduced in evidence. Nineteen of these maps were dated in 1850 or prior, the earliest being dated 1775, being a Spanish map by Ayala. Four of the maps were dated in 1850. Of these, three were made by Ringgold, of the United States Coast Survey Map. From this evidence it is quite possible to infer that Mare Island included the land in question. Approximately thirty maps, dated from 1851 to 1931, were also introduced. In all but two or three of these maps Mare Island is depicted as including the land in controversy.

There was also introduced in evidence a plat showing cross-sections of the land in controversy. The line of the mean high tide is shown and the line of the surface of the land is depicted by using notes of surveys made in 1850 to 1852. The plat is some evidence that the land in controversy was in 1850 higher than the line of mean high tide.

Some of the foregoing evidence is inadmissible, and with respect thereto consideration has been given to it herein for historic purposes only, some of it of only slight probative effect, but considering the difficulty now of proving the extent of the island at the time of the confirmation I believe that the admissible evidence before us shows that the land in controversy was at such time above the line of mean high tide, as the trial court held.

In the United States v. Pacheco, 69 U. S. (2 Wall.) 587, it is said: "By the common law the shore of the sea and, of course, of arms of the sea is the land between ordinary high and low water mark, the land over which the daily tides ebb and flow. When, therefore, the sea or a bay is named as a boundary, the line of ordinary high water mark is always intended where the common law prevails * * *."

The decree of confirmation, stating the boundary as "the water's edge", would therefore mean the line of mean high tide, and such a description would include the land in question.

V. Other Questions

Appellee contends, also that from the time of the cession until the grant was finally confirmed or rejected, the lands ceded were reserved, and therefore could not pass to the state under the Swamp Act.

In San Francisco v. Le Roy, 138 U. S. 656, 670, it was said that the Swamp Act "was never intended to apply to lands held by the United States charged with any equitable claims of others, which they were bound by treaty to protect." Appellee also contends that the evidence shows posession of the land in question by Castro, which is an equitable claim (without the necessity of considering the decree), and therefore the land could not pass to the state.

Discussion of these questions is unnecessary in view of the conclusion I have heretofore reached.

In retrospect it seems to me that appellants' concessions on rehearing have made it impossible to legally support a title in appellants. The decision of the District Court should be affirmed.

For the reasons above set forth, I dissent from the majority opinion as amended and from the order denying the petition for rehearing.

(Endorsed:) Amended Opinion and Dissenting Opinion. Filed June 7, 1937. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 7522

James E. O'Donnell, et al., appellants

vs.

United States of America, appellee

Appeal from the District Court of the United States for the Northern District of California, Southern Division

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed, and that this cause be, and hereby is remanded to the said District Court with instructions to enter a decree that the United States has no title to the patented lands in suit, and that the title is in and quieted in appellants.

(Endorsed:) Decree. Filed, and entered, October 22, 1936. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 7522

JAMES E. O'DONNELL, JUANITA O'DONNELL, HIS WIFE, FLETCHER M. SLOSSON, DOROTHY SLOSSON, HIS WIFE, AND OTHERS, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

Praecipe for entry of appearance

The Clerk will enter our appearance as counsel for appellants, in association with the present counsel for appellants, Messrs. James E. Kelby, Gordon Lawson, and Samuel M. Garroway.

WARREN OLNEY, JR.,
ROBERT L. LIPMAN,
1500 Balfour Building, San Francisco, California.

(Endorsed:) Praecipe for entry of appearance. Filed and appearances entered Nov. 2, 1936. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Monday, June 7, 1937

Before WILBUR, DENMAN, AND MATHEWS, Circuit Judges

Order directing amendment of opinion, denying petition for rehearing, etc.

By direction of the court, it is ordered that the opinion and dissenting opinion, heretofore rendered and filed on October 22, 1936, be amended pursuant to memoranda this day rendered, and, as amended, be filed as of today.

Pursuant thereto, and upon consideration of the petition of appellee, filed November 19, 1936, and within time allowed therefor by rule of court, for a rehearing of above cause, and of the appellant's reply to petition for rehearing, filed December 18, 1936, and of appellee's answer to appellants' reply, filed January 12, 1937, and by direction of the court, it is ordered that said petition be, and hereby is denied, Haney, Circuit Judge, dissenting.

Order extending time within which to apply for writ of certiorari

On consideration of the application of counsel for the United States of America in the above-entitled cause, and good cause therefor having been shown, it is now here ordered that the time within which a petition for a writ of certiorari may be filed herein be, and the same is hereby, extended to and including October 7, 1937.

Dated August 19, 1937.

(Signed) PIERCE BUTLER,
Associate Justice of the Supreme Court of the United States.

Order staying issuance of mandate

Upon application of Frank J. Hennessy, Esq., counsel for the Appellee, and good cause therefor appearing, it is ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is, stayed to and including October 7, 1937; and in the event the petition for a writ of certiorari to be made by the Appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

WILLIAM DENMAN,
United States Circuit Judge.

Dated SAN FRANCISCO, CALIFORNIA.

(Endorsed:) Order of Justice Butler, of Supreme Court, extending time to apply for certiorari, and order of Circuit Court of Appeals staying mandate. September 1, 1937. Paul P. O'Brien, Clerk.

Certificate of clerk, U. S. Circuit Court of Appeals for the Ninth Circuit, to record certified under rule 38 of the revised rules of the Supreme Court of the United States

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two volumes, consisting of one thousand and sixty-three (1,063) pages, numbered from and including 1 to and including 1063, together with original exhibits transmitted herewith, being Plaintiff's Exhibits: Nos. A–K, inc.; L–1 to L–5, inc.; L–6a, L–7, L–8, L–8a, L–8b, L–8c, L–9 to L–13, inc.; L–13a, L–13b, L–14, L–16 to L–31, inc.; L–31a, L–32 to L–38, inc.; M–U, V (See Ex. L–38), W–Z, inc.; Z–1. AA–YY, inc. Defendants' Exhibits: Nos. 2, 3, 5, 6, 7, 9, 11, 12, 13, 14, 15, 16, 19, 26, 27, 28, 29, which were all of the original exhibits filed in this court on the hearing of above cause, to be a full, true, and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals made pursuant to request of Honorable Stanley Reed, Solicitor General of the United States, counsel for appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, this 23rd day of September 1937, at the City of San Francisco, in the State of California.

[SEAL]

PAUL P. O'BRIEN, *Clerk.*
By FRANK H. SCHMID, *Deputy Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1937

Supreme Court of the United States

Order allowing certiorari

Filed November 8, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1938

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES E. O'DONNELL ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above cause on October 22, 1936, reversing the decree of the United States District Court for the Northern District of California.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 967) is reported in 91 F. (2d) 14.

JURISDICTION

The decree of the Circuit Court of Appeals sought to be reviewed was entered on October 22,

1936 (R. 1034). On November 19, 1936, petitioner filed a petition for rehearing, which was denied on June 7, 1937 (R. 1035). On August 19, 1937, an order was granted, extending the time for filing a petition for certiorari to and including October 7, 1937 (R. 1035). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The Board of Land Commissioners for California and upon review the District Court for that State had before them in the 1850's a Mexican private land claim to Mare Island in San Francisco Bay, now a Federal naval base. If the Mexican claim failed, an insignificant part of the property, the portion here in controversy, would not be part of the public domain but instead, according to the view taken by the court below, California would secure it under the general terms of the Swamp Lands Act. The United States, while resisting the Mexican claim before the Board of Land Commissioners, purchased the whole property from the claimants in order to insure its use for naval purposes, but continued to resist the entire claim as it felt it was bound to do both under the terms of the statute providing for the adjudication of native titles and in order to defeat the precedent which would be established by the validation of the Mexican grant. But, because of the swamp land feature and the purchase of the property by the United States, the court below now

takes a position in favor of the successors of California, on the ground that the United States consciously and fraudulently engaged in a collusive suit, failed to resist properly the Mexican claim, and allowed decrees to go for the claimants, thus defeating the grant to California and securing for itself the swamp lands in question. Two principal questions are involved:

(1) Whether the decrees rendered by the Board of Land Commissioners for California in 1855 or, on appeal, by the District Court in 1857, in the case of *Bissell and Aspinwall* v. *United States,* confirming a Mexican private land claim purchased by the United States during the proceedings, are immune against collateral attack and are conclusive and binding upon the successors of California claiming under a grant of swamp lands from the United States; and whether, in any event, attack thereon is barred by laches.

(2) Whether upon the undisputed facts the United States has acquired title by adverse possession—a proposition wholly ignored in the opinion below despite the findings of the trial court.

More particularly, the following questions, among others, are involved:

I. CONCLUSIVENESS OF THE DECREES

1. *Total absence of pleadings or proof.*—Whether—in the complete absence of allegations, proof, findings, or specifications of error with respect to any fraudulent collusion on the part of the United States or its agents in resisting the

Mexican land claim—the Circuit Court of Appeals herein erred in assuming that the Government fraudulently colluded with the claimants, without giving the United States notice or an opportunity to bring out the true state of facts, and thus denying the Government its day in court.

2. *Bona fide nature of proceedings.*—Whether the mere precautionary purchase by the United States of land involved in a Mexican land claim, which the Government was resisting and continued to resist before the Board of Land Commissioners, rendered the proceedings non-adversary in character and a fraud upon California which subsequently claimed part of the land in question as swamp land granted to it—notwithstanding the fact that the United States did, and had every reason to, continue a bona fide resistance to the Mexican claim because (a) the terms of its purchase provided that, should the Mexican claim be defeated, the United States could recover the purchase price, (b) Attorney General Cushing was "constrained, in the plainest dictates of public duty" to prosecute the case vigorously through the Federal courts because, as a precedent, the case would affect "many millions worth of land in California, which is otherwise public domain," (c) by act of its legislature, California evidenced its willingness to grant similar swamp lands to the United States without charge in order to secure the creation of a naval base, and (d) the District Court and the State of California were fully advised of the Government's transaction.

3. *The United States a donor, not a trustee.*—Whether, because swamp lands had been granted to California by general statute, the United States, in resisting Mexican land claims under the Act of 1851, was charged with the duties of a trustee for California, whenever swamp lands were involved, and hence held to an unusual and "extra-ordinary burden of proof" to establish its good faith in such cases—although the United States was a mere donor of the swamp lands and had not specified or ascertained what lands were swamp nor yet conveyed legal title, and although the lands in question were claimed by private parties under an earlier Mexican grant, and the officers of the United States were legally bound both to conduct the proceedings here challenged and to acquire sites for naval purposes; and whether, further, under such circumstances, "once the government acquired the interest adverse to California, * * * it can take no advantage from the proceedings before the commission."

4. *Decree binding on California as a grantee from the United States.*—Whether—despite a statutory provision that decrees of the Land Commission or courts shall be "conclusive" between the United States and the claimants under Mexican grants and "shall not affect the interests of third persons" and despite the steady course of decisions of this Court that California, as a grantee of the United States, is not a "third person" under the Act—the assumed bad faith of the

Government would render California a "third person" under a new interpretation of the statute and hence not bound by the decree.

5. *Alleged nonadversary character of proceedings immaterial.*—Whether, assuming that the proceeding before the Board of Land Commissioners was non-adversary in character, the decree of the Board is void for that reason—notwithstanding the fact that this tribunal was legislative and administrative in character, empowered to dispose of private land claims even upon *ex parte* procedure.

II. ADVERSE POSSESSION

6. Whether the Circuit Court of Appeals erred in ignoring the findings of the trial court based upon undisputed evidence to the effect that the United States had been in actual, open, adverse, and exclusive possession of the lands in question since 1853 under claim of absolute ownership and color and claim of title, and in refusing to quiet title in the United States.

STATUTES INVOLVED

The full texts of the Act of September 28, 1850 (c. 84, 9 Stat. 519) granting swamp and overflowed lands of the United States; the Act of March 3, 1851 (c. 41, 9 Stat. 631) creating a board of land commissioners and providing for the determination of private land claims in the State of California; and C. XLIII, Laws of California,

1854–1855, pp. 48–49, consenting to the purchase of Mare Island by the United States, are set forth in the Appendix, *infra*, pp. 35–46.

STATEMENT

The United States brought this suit in the District Court for the Northern District of California to quiet title to a tract of land on Mare Island, Solano County, California, which it has occupied since 1853 as part of the Mare Island Navy Yard Reservation (R. 2–3). The court was asked to cancel a purported patent which had been issued by the United States to California (in compliance with a writ of mandamus from the Court of Appeals of the District of Columbia (R. 37–39), that court stating that "the mere issuance of a patent to California determines no legal or equitable right of the United States in the premises") and another issued by California to one Darlington (R. 17), through whom the defendants herein claimed some interest in the land (R. 13).

As set forth in the bill of complaint, and found by the trial court, on May 20, 1841, the Governor of Mexico granted the entire island to Victor Castro, and Bissell and Aspinwall, having succeeded to Castro's title under the grant, filed their petition before the Board of Land Commissioners seeking confirmation of their claim of title as provided in the Act of March 3, 1851 (R. 5, 164). Thereafter, proceedings were had and on May 8, 1855, the

Board entered a decree confirming claimants' title (R. 5–6, 164–165). The United States appealed from the Board to the District Court of the United States for the District of California, where the decree of the Board was affirmed and the claimants' title again confirmed (R. 7, 166, 167). Because of "accident, oversight, inadvertence or excusable neglect" (R. 21, 290), the decree of the court was unsigned, and a decree, *nunc pro tunc* as of March 2, 1857, was rendered, filed and entered, on April 15, 1930 (R. 20–22, 289–291).

On December 18, 1852, while these proceedings were still pending, Bissell and Aspinwall executed a contract to sell Mare Island to the United States (R. 308–312) and on January 4, 1853, joined in a deed conveying title to the Government for a consideration of $83,491.00 (R. 22–26, 168–169, 302–308). On February 28, 1853, they executed a bond in favor of the United States in the sum of $200,000.00, conditioned upon the validity of their contract and conveyance of an unencumbered fee simple title, it being recited in the bond that they were to save harmless the United States against any adverse claim or title in any "persons or body politic" which might be made within two years and thereafter successfully established (R. 308–312).

Also, while these proceedings were still pending, on May 11, 1854, California consented to the purchase by the United States of the whole island, and in addition granted all its title and interest to and

ded its jurisdiction over certain other swamp nds on the shores of Mare Island. California tatutes, 1854–1855, C. XLIII, pp. 48–49.

On November 6, 1850, President Fillmore re- rved the island from public entry (R. 8, 328– 9) and on February 9, 1853, the Secretary of the avy selected Mare Island for a Navy Yard and a aval Depot, recommending that the "premises be served from public use." His selection was ap- oved and the lands reserved for naval purposes the President on February 11, 1853 (R. 9, 381).

The United States has at all times since Septem- r 16, 1853, been in "actual, open, adverse, and clusive" possession of the land "under claim of ght and of absolute ownership in fee of said land, d under title and color and claim of title", and s placed improvements upon the property here volved which exceed $1,250,000 in value (R. 10– , 171, 172).

The lands here in controversy include only a very all fraction of the island, embracing originally ly 164 acres of swamp or overflowed lands on its ores; but, through accretion, in the course of ore than seventy years this fraction has grown about five hundred acres (R. 163). This has me about in part by "filling in" operations con- cted by the United States (R. 784–785, 796–797). By their amended answer (R. 100–121) defend- ts denied the Government's ownership of the nds here in controversy, and asserted title in emselves as tenants in common (R. 100). By

specific denials they put in issue the existence and validity of the Castro grant (R. 101, 109), the validity of both decrees of confirmation (R. 101–102), the validity of the conveyance to the United States and of the Executive Reservation Orders (R. 102), and the adverse possession by the United States (R. 104).

The amended answer prayed "that the title of these defendants be quieted as against plaintiff" (R. 121); and to support their prayer for such affirmative relief the defendants alleged that the lands in question were swamp lands which passed to California under the Act of September 28, 1850, and that, through conveyance from California's grantee, Darlington (R. 109), and by virtue of the patent from the United States to California, issued in 1928 in obedience to a peremptory writ of mandamus (R. 37), legal title was then vested in them (R. 109–110).

The trial court made findings of fact and conclusions of law in favor of the United States and against the defendants on all of the issues (R. 160–201) and gave a decree granting the relief prayed for by the United States (R. 202–206).

On appeal, the Circuit Court of Appeals for the Ninth Circuit reversed the decree, holding "that the United States has no title to the patented lands in suit and that the title is in and quieted in appellants" (R. 1034). Upon denial of the Government's petition for rehearing, the court amended its original opinion but reaffirmed its

holding (R. 967–1009). Circuit Judge Haney dissented (R. 1009–1034; 1035). The majority opinion is grounded upon the proposition that the United States was, by virtue of the Swamp Lands Act, a trustee for California and that, through its purchase of a deed to the land from Bissell and Aspinwall and its subsequent conduct of the proceedings before the Land Board, it so violated its duties as a trustee that the decrees obtained by Bissell and Aspinwall in the 1850's were void and are now subject to collateral attack. The crucial ground of the majority opinion is reflected in various phrases, such as "pretended controversy", "sham proceeding", nonadversary action", "faked opponent", "pretended adversary proceeding", "ethics involved", "simulated opposition", "reprehensible", "obligations of honesty", "judicial farce", "pretended attorneys", "concealed nonadversary proceedings", "ethical significance", and so forth. Adverse possession is not mentioned.

SPECIFICATION OF ERRORS TO BE URGED[1]

The Circuit Court of Appeals erred:

1. In holding that the United States fraudulently colluded with Bissell and Aspinwall to deprive California of the lands in question.

2. In holding that with reference to these lands the United States was a trustee and California was

[1] Specified errors Nos. 6, 7, 8, 9, and 15 are not urged as a reason for granting the writ of certiorari, but are reserved for argument if the writ should be granted.

its *cestui que trust* and that in the proceedings in *Bissell and Aspinwall* v. *United States* before the Board of Land Commissioners and the District Court it had a trust duty to perform which it deliberately violated in purchasing the property of the claimants in the pending proceedings and improperly defending the interests of its *cestui*.

3. In holding that California was a "third person" under Section 15 of the Act of March 3, 1851 (9 Stat. 631, ch. 41) and that, therefore, California and respondents are not bound by the decree in *Bissell and Aspinwall* v. *United States*.

4. In holding that the proceedings in *Bissell and Aspinwall* v. *United States* were non-adversary and hence subject to collateral attack by California or respondents.

5. In holding the United States subject to "more than ordinary burden of proof" applicable to suits to quiet title, in seeking to have declared void the patent issued by the Secretary of the Interior to California.

6. In holding that the lands in question were subject to the operation of the Swamp Lands Act of September 28, 1850, despite the pendency of the Castro claim.

7. In holding that by the Treaty of Guadalupe Hidalgo, July 4, 1848, ownership of these lands in dispute was transferred to the United States.

8. In holding that on September 28, 1850, by an Act of Congress (9 Stat. 519), the United States transferred to California "the entire equitable in-

terest in the lands" and even "whatever title it had to the swamp and overflowed lands here in question."

9. In holding that the reservations of the lands by President Fillmore, for use as a navy yard, were ineffective.

10. In holding that the signature of the district judge was necessary to the validity of the decree in *Bissell and Aspinwall* v. *United States,* and in holding that the decree was not effective as of March 2, 1857, or May 8, 1855.

11. In failing to hold that the respondents were barred from upsetting the decree in *Bissell and Aspinwall* v. *United States,* because of California's acquiescence in the proceedings and because of the doctrine of laches.

12. In holding that the United States can take no benefit from the decree in *Bissell and Aspinwall* v. *United States,* and that the motion to strike from the evidence the judgment and record in that case should have been granted.

13. In holding that the decrees rendered in *Bissell and Aspinwall* v. *United States,* under the Act of March 3, 1851, c. 41, 9 Stat. 631, were not conclusive as against attack by California or respondents.

14. In failing to hold that the United States had acquired title by adverse possession.

15. In holding that the certified copies of the Mexican grant of Mare Island to Castro were not admissible in evidence; that no proper search for

the original had been made; that there was no evidence of even a possessory right in or possession by Castro; that Castro acquired no title because a duplicate of the grant was not shown to have been filed in the Mexican archives.

16. In failing to affirm the decree of the District Court, in not quieting title in the United States, and in quieting title in respondents.

REASONS FOR GRANTING THE WRIT

I. CONCLUSIVENESS OF DECREES

In holding that the United States had fraudulently colluded with Bissell and Aspinwall to deprive California of the lands in question the court below has so far departed from the accepted and usual course of judicial procedure and decision as to call for an exercise of this Court's power of supervision.

1. Total absence of pleadings or proof of collusion.—The court below decided this cause against the Government by resolving factual questions which were not and are not now at issue in this case. For the first time, although the question had not been raised or considered either in the trial court or when the matter was argued and submitted to the Circuit Court of Appeals, the majority below injected the declaration that the United States was guilty of fraud in the *Bissell and Aspinwall* case—a finding of fact with no evidence to support it. Moreover, though the decree of the Land Commission and the confirmatory decree of

the court were attacked as null and void in respondents' answer (R. 101, 102), and, on various grounds, by their motion to dismiss (R. 142–145), nowhere did their pleadings or proofs suggest any fraud, collusion, bad faith, or concealment. Not one of the sixty-nine assignments of error presented such a contention (R. 909–938). At so late a stage of the proceedings, the United States was wholly prevented from bringing forth true evidence to rebut the court's assumption. Obviously, such a holding, which takes the United States by surprise, denies petitioner its day in court, and condemns the Government without a hearing, constitutes prejudicial and reversible error. Cf. *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267.

2. Bona fide nature of the proceedings.—But, even upon the record herewith submitted, it appears that the assumption of fraud upon California is wholly untenable. The Castro Grant covered uplands and only an insignificant portion of swamp land and, if the grant were proved invalid, these more valuable upland portions of the island would not revert to California but would become public domain—which the Federal Government was striving to conserve and protect. If the United States could defeat the Mexican claim, under the terms of its purchase it could recover its $83,000 from Bissell and Aspinwall and have the valuable uplands as well, without cost. Finally,

there is small doubt that California, to secure the local establishment of a Federal naval station, would gladly have conceded to the United States these remaining swamp lands of insignificant value, as it did other lands of Mare Island for these same purposes (California Statutes, 1854–55, ch. 43, p. 48).

The opinion of Attorney General Cushing, which the majority of the court below relies upon as evidence of bad faith (R. 992) shows, first, that the Attorney General felt "constrained, in deference to the plainest dictates of public duty", to protect the interests of the United States by an appeal because, as a precedent, the case would affect "many millions worth of land in California, which is otherwise public domain", and to make no admission that the purchase by the United States operated as an assent to the alleged validity of the Castro Grant (8 Op. A. G. 422, 424). Secondly, it is clear that there was no idea of depriving California of its swamp lands since the Attorney General was of the opinion, erroneously, as it appears from subsequent decisions of this Court,[2] that the claim of California would not be settled by the proceedings before the Land Board, and he, therefore, advised that before any expenditure be made towards improving Mare Island, California be asked to cede the claims it might have, if any, to the shores and overflowed land (p. 426). If his

[2] See Point 4, *infra*, pp. 24–26, especially footnote, p. 25.

assumption were correct, California could not be defrauded. Thirdly, it is also clear from his opinion that Cushing's predecessor, Attorney General Crittenden, had thought that Bissell and Aspinwall's claims were of such seriousness that they should be purchased and that he had apparently given no thought to any possible ownership on the part of California (pp. 422–423).

Despite repeated assertions to the contrary in the opinion below, the purchase by the United States from the claimants was disclosed to the District Court, as shown on page eight of the transcript of record in the *Bissell and Aspinwall* case. The omission of this page from the record in the instant case is explained by the fact, as pointed out above, that appellants made no allegations of fraud or collusion, or that the United States had failed to call the court's attention to their purchase of the claimants' interest.

Further evidence of the good faith of the officials is shown in the proceedings in *Bissell and Aspinwall* v. *United States*, which, as was customary before such boards, were not elaborate. The testimony of witnesses Cooper (R. 222–226), McDaniel (R. 244–245), and Mizner (R. 245–246), which the Government brought out, and the cross-examination by the Government of claimants' witness Alvarado, was such as to cast on the minds of the Board very strong suspicions of the validity of the Castro Grant (R. 277). Collusive litigants would not offer such damaging testimony.

But a most important factor is that the court below had before it (Appellee's Brief, Appendix, p. xi) conclusive evidence that California knew and had consented to the purchase of the Bissell and Aspinwall interests in an act of consent passed on May 11, 1854 (California Statutes, 1854–55, c. 43, p. 48), some months prior to the taking of testimony in the *Bissell* case, and a year prior to the decree of the Board. Section 1 consents to the purchase of Mare Island by the United States for naval purposes, and Section 2 cedes certain swamp lands and provides that this consent and grant shall not operate to the "aid or support, directly or impliedly, of any conveyance or bond for title to the United States of the same lands heretofore made"—obviously referring to the Bissell and Aspinwall grant and bond to the United States. There is no intimation anywhere in the proceedings of "any conveyance or bond * * * to the United States * * * heretofore made" other than that of Bissell and Aspinwall (conveyance, R. 302 and bond, R. 308). In other words, if they did not make good their claims in the proceedings on the Mexican claim, the Government would not be precluded by this Act from recovering under that portion of the bond which provided that the grantors "shall also indemnify and save harmless the United States against any adverse claim or title in any other person or persons or *body politic*" (R. 310). [Italics supplied.]

3. The United States a donor, not a trustee.—The opinion of the majority below is grounded upon the untenable legal theory that, under the Swamp Lands Act of 1850, the United States held legal title to the lands in question as trustee for California and that the Government deliberately violated a trust duty to its *cestui que trust* by purchasing Bissell and Aspinwall's interests in the lands while the proceedings before the Board of Land Commissioners and the District Court were still pending and by not properly contesting the Castro claim, and that, therefore, the United States could take no benefit from the decree in the case of *Bissell and Aspinwall* v. *United States.*

In order to set up a trust relationship, an intention to assume the duties of a trustee must be either manifested or fairly implied from the facts (Restatement of the Law of Trusts, pp. 1, 2). No provision in the Swamp Lands Act of September 28, 1850, indicates that the United States either assumed any fiduciary relationship or in any way undertook to hold and protect these lands for the use and benefit of its grantees in the technical manner of a trustee. The Government was merely a donor. It was gratuitously divesting itself of parts of its domain for specific purposes and only to those who would comply with the conditions imposed by the Act. It may have passed on to the States a beneficial interest in the swamp land, but like a vendor of land who has not received pay-

ment (*Jennisons* v. *Leonard,* 21 Wall. 302, 309; cf. 1 *Bogert,* Trusts and Trustees, § 18) or like an ordinary mortgagee holding legal title (*Dobson* v. *Land,* 8 Hare 216, 220; 1 *Bogert,* Trusts and Trustees, § 29) the United States did not become a trustee in any sense.

Thus it has been held that, despite the proviso to Section 2 of the Swamp Lands Act to the effect that the proceeds of swamp lands sold by the State should be applied to reclamation by levees and drains, no trust for this purpose was thereby attached to the lands (*Mills County* v. *Railroad Companies,* 107 U. S. 557). Similarly, under an 1855 statute providing that the proceeds of swamp lands sold by the United States subsequent to the passage of the 1850 statute should be paid over to the States, it was held that "the proceeds of the swamp lands are not subject to a property trust, * * * in the hands of the United States" in a sense which would preclude the United States from setting off a debt against the claim of a State to such proceeds (*United States* v. *Louisiana,* 127 U. S. 182, 191).

No authority has been found to intimate in any way that the United States was charged by the Act with the obligations of a trustee. Certainly *Brown* v. *Hitchcock,* 173 U. S. 473; *Orchard* v. *Alexander,* 157 U. S. 372; *Hoyt* v. *Latham,* 143 U. S. 553; *Chicago &c. Ry.* v. *Des Moines &c. Ry.,* 254 U. S. 196; *Mason* v. *United States,* 17 Wall. 67, cited by the court below (R. 991–992), give no support to its

assumption. Whether or not the United States was charged with the duties of a trustee for the benefit of its grantees under the Act in question or acts similar to it was not involved in any of these cases and they are clearly not in point.

Moreover, there is nothing in the Act of March 3, 1851, providing proceedings for "ascertaining and settling private land claims in the State of California" (Sec. 1), from which it may be said that the United States assumed the role of trustee in these proceedings as to "swamp and overflowed" or any other kinds of lands. Its sole purpose was to discharge the political obligation, imposed by the law of nations and assumed by the United States in the Treaty of Guadalupe Hidalgo, to protect property rights that had vested in the inhabitants prior to the acquisition of California. The United States had no other interest in the proceedings. *Beard* v. *Federy*, 70 U. S. 478; *More* v. *Steinbach*, 127 U. S. 70; *San Francisco* v. *LeRoy*, 138 U. S. 656; *Knight* v. *U. S. Land Association*, 142 U. S. 161.

Accordingly, it is submitted, the attempt of the majority of the court below to erect a trust relationship must fail completely and its conclusion that petitioner "can take no advantage from the proceeding before the Commission" (R. 992) is consequently erroneous. But even if the Circuit Court were correct in its view that the United States was a trustee, the holding that the United States could take no benefit from the decree is unsound. Fraud, bad faith, and concealment were

not alleged nor proved (Point 1, *supra*). There was convincing evidence of good faith on the part of the United States in the whole transaction, of consent by California to the sale, and disclosure to the court (Point 2, *supra*).

Conceding *arguendo* all that the court below assumed, California and its successors, as *cestuis*, could not stand by for an undue length of time and then hope to avoid the decree. The United States has been in open and undisputed possession of the land since 1853. California had knowledge of the purchase and of the use of the island as a naval base. The District Court rendered its decree in *Bissell and Aspinwall* v. *United States* in 1857.[3] In reliance on these facts the United States has improved the land and erected various structures thereon. A *cestui* who has acquiesced in any conduct of his trustee may not thereafter set it up as a breach of trust (4 *Bogert*, Trusts and Trustees,

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[3] The failure of the Court of Appeals to apply the doctrine of laches may, perhaps, be due to its failure to recognize this unsigned decree. But it is elementary that the signature of a judge is not necessary to make a decree valid in the absence of a statute requiring signature. Many cases are collected in 33 C. J. p. 1212, sec. 152; 15 R. C. L. p. 585, sec. 21. Indeed, statutory requirements have been held merely directory. *Secombe* v. *Steele*, 20 How. 94, 102 (statute of Territory of Montana); *United States* v. *Stoller*, 180 Fed. 910, 912–913 (E. D. Wash.) (United States statute regarding naturalization certificates). No Federal statute requiring the signature of the District Judge has been found, or cited by the court below. The unsigned decree was valid from the date of entry.

secs. 941, 942), much less a *cestui*, such as California, who has taken action to preserve the rights of the United States in the transaction. Moreover, respondents or their predecessors in interest did not institute mandamus proceedings to procure the patent until *Work* v. *United States*, 23 F. (2d) 136 (App. D. C., 1927), and indeed did not even attempt court proceedings prior to the unsuccessful ejectment action, *Sawyer* v. *Osterhaus*, 212 Fed. 765 (N. D. Cal.), instituted in 1910, see *Work* v. *United States*, *supra*, p. 137.[4] Under these circumstances, having slept too long on their rights, if any, equity will not permit respondents to attack the decree, *Hume* v. *Beale's Executrix*, 17

[4] The court below takes comfort from the issuance of a patent to California for the lands here in controversy, in response to a peremptory writ of mandamus from the courts of the District of Columbia, but in concluding that this patent suggests that a trust relationship existed in 1850 and that "in seeking to have declared void a patent from the United States, which by reverting to September 28, 1850, evidences a then grant of full legal title to the lands, the United States has a more than ordinary burden of proof" the Circuit Court of Appeals has completely disregarded *Work* v. *United States*, 23 F. (2d) 136 (App. D. C., 1927). The Secretary of the Interior had refused to certify the lands to California on the ground that in 1850 they were owned by a Mexican grantee. Respondent, James E. O'Donnell, sought a writ of mandamus, which was granted by the trial court without consideration of the Secretary's objections. In affirming the judgment, the Court of Appeals held that the trial court "was right in laying aside all consideration of the controversy between relator and the United States as to title", and it expressly asserted that "the mere issuance of patent to California determines no legal or equitable right of the United States in the premises" (p. 138).

Wall. 336, 348; *Speidel* v. *Henrici,* 120 U. S. 377, 387; *Hammond* v. *Hopkins,* 143 U. S. 224, 250; *Wetzel* v. *Minnesota Ry. Co.,* 169 U. S. 237; *Clark* v. *City of Chicago,* 70 F. (2d) 172 (C. C. A. 7th).

4. Decree binding on California as a grantee of the United States.—Notwithstanding the views of the majority below as to the effect of the decree, the statute under which the Land Board and District Court acted in *Bissell and Aspinwall* v. *United States* specifically provides in Section 15 that the decrees of the Board and the courts shall be "conclusive" between the United States and the claimants under Mexican grants but "shall not affect the interests of third persons." The steady course of decision of this Court has determined that California, as a grantee from the United States, was not a "third person" under the statute. *Knight* v. *U. S. Land Association,* 142 U. S. 161; *San Francisco* v. *LeRoy,* 138 U. S. 656; *Beard* v. *Federy,* 70 U. S. 478; *More* v. *Steinbach,* 127 U. S. 70.

The reason for this rule, which has been consistently adhered to by this Court and the courts of California, is summed up accurately by Chief Justice Field in *Leese* v. *Clark,* 20 Cal. 387, 426, as follows:

> The State and individuals hold whatever property they possess which formerly belonged to the Mexican Government, through the United States, and necessarily, therefore, in subordination to the action of the

> United States whilst they held it, and in subordination to any action with respect to such property which they covenanted or were bound to take upon its acquisition. The legal effect of the action of the Government is the same as if such action had been taken the very day upon which the Mexican authorities were displaced.

Indeed, in reply to appellees' petition for a rehearing in the court below, appellants conceded this to be foreclosed as a general rule of law (R. 1026).

Despite the appellant's concessions and the clear-cut pronouncements by this Court that the United States "and all parties claiming under it by titles subsequently acquired"* (*Knight* v. *U. S. Land Association, supra,* p. 184) are not "third persons" under the Act, the court below concluded that the interpretation of the term "third persons" should be changed to include California because of the assumed bad faith of the United States as an alleged trustee in conducting a so-called "pretended adversary proceeding." No canon of interpretation has been found which justifies this departure.

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* By "title subsequent" is meant titles derived subsequent to the Treaty of Guadalupe Hidalgo; persons claiming under a title derived from the United States subsequent to the treaty are bound by a decree of the Board of Land Commissioners as fully as thought their title were based on grants subsequent to the proceedings. *Beard* v. *Federy*, 3 Wall. 478, 491–493; *United States* v. *Coronado Beach Co.*, 255 U. S. 472, 487–488, and cases cited.

Lord v. *Veazie*, 8 How. 251, on which the majority opinion relies, lends no support to such an interpretation, for it merely involved the propriety of declining to consider a collusive suit and had nothing to do with the interpretation of a statute. It does not change the fact that California claimed title through the United States and, hence, was not a "third person" under the interpretation put on the statute by the steady course of decisions of this Court.

5. Alleged nonadversary character of proceedings immaterial.—The court below erred and disregarded applicable decisions of this Court, in holding (R. 999–1004) that the acquisition of the land from Bissell and Aspinwall left no issue of which the Land Board or District Court could take jurisdiction. The purposes of the Act conferring authority upon the Board and the Court were "ascertaining and settling private land claims in the State of California", a matter requiring no controversy. The majority's view (R. 1000) that the Board's duty was to ascertain and settle the claim as between the two adverse parties, ignores applicable decisions of this Court.

The Board was an administrative tribunal. *United States* v. *Ritchie*, 17 How. 525; *Grisar* v. *McDowell*, 6 Wall. 363, 375; *United States* v. *Fossatt*, 21 How. 445. Unless the statutes under which it was created required adversary proceedings, none were necessary. The provision in the Act for the attendance of the "agent" of the United States

looked only to the presence of a representative of the Government to "superintend its interests in the premises" (Sec. 4), that is, to protect the Government from the assertion of invalid or fraudulent claims.

That this Court does not think adversaries were necessary is clear. In *Meader* v. *Norton*, 11 Wall. 442, 451–52, the Court said:

> Applicants for such confirmations were required to present their claims to the commissioners when sitting as a board, but the act of Congress made no provision for notice to any adverse claimant, and the proceedings before the commissioners were wholly ex parte unless opposed by the district attorney.

And in *United States* v. *Fossatt, supra*, the Court said (pp. 450–451):

> The United States did not appear in the courts as a contentious litigant; but as a great nation, acknowledging their obligation to recognise as valid every authentic title, and soliciting exact information to direct their executive Government to comply with that obligation.

For other decisions approving the determination of private land claims without adversary proceedings, see instances where statutes provided simply for a final determination of claims by Congress subsequent to administrative investigations and reports, by a special commission (*Henderson* v. *Poindexter*, 12 Wheat. 530) or by a surveyor gen-

eral (*Tameling* v. *U. S. Freehold and Emigration Co.*, 93 U. S. 644, 662).

As authority to support the contrary view, the court below was obliged to rely on general language from cases in which the question of the necessity of a controversy was not involved. See *Beard* v. *Federy*, 3 Wall. 478, 480; *Grisar* v. *McDowell*, 6 Wall. 363, 374; *United States* v. *Throckmorton*, 98 U. S. 61; *St. Louis* v. *Rutz*, 138 U. S. 226, 250.

Finally, so far as the proceedings before the Board are concerned, merely because Congress has provided for an appeal to constitutional courts (where adversary procedure may be a requisite and hence the appeal taken by the United States may have been ineffective), it does not follow that the decree of the administrative tribunal will also fail (*Keller* v. *Potomac Electric Co.*, 261 U. S. 428; *Radio Comm.* v. *General Elec. Co.*, 281 U. S. 464; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693; *Ex Parte Bakelite Corp.*, 279 U. S. 438), particularly where, as here, the tribunal is set up to determine political or international obligations, and where to allow its decrees to be assailed at this late date will unsettle other decrees obtained in the numerous "ex parte proceedings" under the Act.*

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* The situation here is different from that disclosed in *Muskrat* v. *United States*, 219 U. S. 346. The natural presumption there that a constitutional court is the proper tribunal to decide a constitutional question, does not apply here where the problem is the administrative determination of political obligations. There is nothing in the present Act to

So far as the decree of the District Court in *Bissell and Aspinwall* v. *United States* is concerned, even if adversary proceedings were necessary (though see particularly *Schmertz Wire Glass Co.* v. *Western Glass Co.*, 178 Fed. 977, 986–988 (C. C. N. D. Ill.); 185 Fed. 788 (C. C. A. 7th)), here, as has been previously pointed out, the parties were vitally interested in having an opposite result reached in the decree, and the United States felt bound to resist the claim in order to defeat a precedent which would affect "many millions worth" of public domain (Point 2, *supra*, p. 15 ff). And in any event, even if the decree might originally have been attacked for want of an adversary proceeding, in this case the acquiescence of the respondents and their predecessors in interest, and their long delay in instituting proceedings, precludes any attack on the decree now. (See Point 3, *supra*, at pp. 22–24.)

II. ADVERSE POSSESSION

In disregarding the trial court's finding that the United States had acquired title to the lands in question by adverse possession (R. 171, 179, 197),

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indicate that the court should reach a different result from that in *Keller* v. *Potomac Elec. Co.*; *Radio Comm.* v. *General Electric Co.*; *Postum Cereal Co.* v. *California Fig Nut Co.*; *Ex Parte Bakelite Corp.*, cited in the text, and the court below should have so held.

the Circuit Court of Appeals has ignored general principles of law and applicable decisions of this Court, and has also ignored California statutes and decisions governing questions of local law.

The bill of complaint alleges that the United States is the owner of the lands in question and that it has occupied them at all times since 1853 as a Navy Yard for military and naval purposes (R. 3–4). Its possession is alleged to have "at all times been actual, open, adverse and exclusive and under claim of right and of absolute ownership in fee of said land, and under the title and color and claim of title" (R. 10–11). These allegations were denied by the defendants (R. 104), evidence in support of them was received (R. 328–329, 379–383, 583–590, 784–786, 800, 838), and the trial court found (R. 171) that "the possession of the United States has at all times been actual, open, adverse and exclusive and under claim of right and absolute ownership in fee of said land, and under the title and color and claim of title." See also Findings XXI and XLVIII (179, 197). These Findings were assigned as error (R. 912, 918, 923, 927), but the court below ignored them entirely, possibly because counsel for the United States did not press the point in argument though the point was argued in the brief of appellants.

Under Section 1007 of the California Civil Code,[1] read in conjunction with the California Code of

[1] This suit is not affected by the recent amendment of Section 1007 of the Civil Code by Cal. Stat. 1935, p. 1592. The

Civil Procedure, Sections 318–319, 321–325, as required by *Akley* v. *Bassett,* 189 Cal. 625, 645, the United States acquired a "perfect title" by prescription, *Wutchumna Water Co.* v. *Ragle,* 148 Cal. 759, 764, when it occupied the land adversely for five years. Possession under a claim of title founded upon a written conveyance or court judgment is deemed adverse where the land "has been usually cultivated or improved." California Code of Civil Procedure, Sections 322, 323. Even where title is not founded on a written instrument or judgment, such possession is adverse. California Code of Civil Procedure, Section 325.[8]

Sufficient compliance with these sections is shown by the finding of the trial court (No. VIII, R. 171) and the undisputed evidence that the possession of the United States has at all times been actual, open, adverse and exclusive, under claim of title supplied by the Presidential reservations, the deed from Bissell and Aspinwall, the decision of

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amendment is prospective in its language; it precludes the acquisition of a prescriptive title against a county, city, etc., and does not apply to private owners or patentees; and its effect is limited to "possession by any person, firm or corporation."

[8] This section contains a proviso that the party have paid all state, county, and municipal taxes levied and assessed upon the land, but it is immaterial here that no taxes have been paid since none were assessed (R. 477), (*Spargur* v. *Heard,* 90 Cal. 221, 230; *Heilbron* v. *Last Chance Water Ditch Co.,* 75 Cal. 117), and since in any event the United States is not subject to property taxation by the States (*Van Brocklin* v. *Tennessee,* 117 U. S. 151, 180).

the Board of Land Commissioners and the confirmatory order and decree of the District Court, and that the lands "during such period of occupancy of the complaint, have been improved for military and naval purposes by the construction of buildings and improvements thereon."

Since the decision of this Court in *Stanley* v. *Schwalby,* 147 U. S. 508, there has been no doubt of the Government's right to acquire title by adverse possession; and adverse possession is an adequate basis for a suit in equity by the United States to quiet title. *United States* v. *Oregon,* 295 U. S. 1, 25. The instant case presents all the features of adverse possession relied on in *United States* v. *Oregon, supra:* acquisition of title by the United States; which was never subsequently conveyed away in terms; continued claim of title and continued possession without any interference thereof (R. 171); an executive order of reservation constituting an assertion of title and possession (R. 169–170, 379–381); exercise of control by the United States, in the erection of various structures (R. 171–172).

Application of the doctrine of adverse possession is not precluded by any suggestion that at one time the United States held the lands as trustee for California under the Act of September 28, 1850. The courts both of the United States and of California hold that a trustee can acquire prescriptive title to the land held in trust after open and unequivocal repudiation of the trust and actual knowledge

thereof by the *cestui que trust*. *Speidel* v. *Henrici*, 120 U. S. 377; *Dugan* v. *O'Donnell*, 68 Fed. 983 (C. C. N. D. Calif.); *Norton* v. *Bossett*, 154 Cal. 411; see *Zeller's Lessee* v. *Eckert*, 4 How. 288, 295; *Willison* v. *Watkins*, 3 Pet. 42, 47–48; *Love* v. *Watkins*, 40 Cal. 547, 568–572. The facts, heretofore discussed, clearly show that the United States unequivocally repudiated California's claim, by claiming and using the land for its own naval and military purposes, and that California had knowledge of this repudiation.

IMPORTANCE OF THE ISSUES HEREIN

It is of tremendous importance both to the United States and to California land owners generally that this petition be granted. The particular lands involved are vitally important to the United States because of their strategic value as a naval base. The United States has been in undisputed possession for seventy-three years. It has spent $2,000,000 developing these lands as an integral part of the Mare Island naval base (R. 1009), and we are informed that expenditures on other parts of the island exceed $40,000,000. Their loss will impair the utility of the entire base. In addition, the title of the United States to 6,000 acres of adjacent lands is at issue in *United States* v. *Stewart* (Equity No. 2685–5, D. C., N. D. Calif. S. D.) and the trial judge in that case has announced that his decision will be determined by the ultimate outcome of this case.

The decision below creates wholesale uncertainty with respect to California land titles. Eighty-six years ago Congress set up a Board of Land Commissioners to pass upon the validity of land held or claimed under Mexican grants. This Court has frequently held that a determination by the Commissioners was conclusive against the United States, California, or anyone claiming under either of them. Now, the Circuit Court of Appeals declares that, at least in some ill-defined circumstances, the decisions of the Land Commissioners are not conclusive against California or persons claiming under it. If this decision stands, holders of title unquestioned for generations are threatened with harrassment and possible eviction.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

OCTOBER 1937.

APPENDIX

Act of September 28, 1850, c. 84, 9 Stat. 519:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.

SEC. 2. *And be it further enacted,* That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however,* That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

SEC. 3. *And be it further enacted,* That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation",

shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

SEC. 4. *And be it further enacted,* That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known as designated as aforesaid, may be situated.

Approved, September 28, 1850.

Act of March 3, 1851, c. 41, 9 Stat. 631:

Chap. XLI. An Act to ascertain and settle the private Land Claims in the State of California.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of ascertaining and settling private land claims in the State of California, a commission shall be, and is hereby, constituted, which shall consist of three commissioners, to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States.

SEC. 2. *And be it further enacted,* That a secretary, skilled in the Spanish and English languages, shall be appointed by the said commissioners, whose duty it shall be to act as interpreter, and to keep a record of the proceedings of the board in a bound book, to be filed in the office of the Secretary of the Interior on the termination of the commission.

SEC. 3. *And be it further enacted,* That such clerks, not to exceed five in number, as

may be necessary, shall be appointed by the said commissioners.

SEC. 4. *And be it further enacted,* That it shall be lawful for the President of the United States to appoint an agent learned in the law, and skilled in the Spanish and English languages, whose special duty it shall be to superintend the interests of the United States in the premises, to continue him in such agency as long as the public interest may, in the judgment of the President, require his continuance, and to allow him such compensation as the President shall deem reasonable. It shall be the duty of the said agent to attend the meetings of the board, to collect testimony in behalf of the United States, and to attend on all occasions when the claimant, in any case before the board, shall take depositions; and no deposition taken by or in behalf of any such claimant shall be read in evidence in any case, whether before the commissioners, or before the District or Supreme Court of the United States, unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the district attorney of the proper district, so long before the time of taking the deposition as to enable him to be present at the time and place of taking the same, and like notice shall be given of the time and place of taking any deposition on the part of the United States.

SEC. 5. *And be it further enacted,* That the said commissioners shall hold their sessions at such times and places as the President of the United States shall direct, of which they shall give due and public notice; and the marshal of the district in which the board is sitting shall appoint a deputy,

whose duty it shall be to attend upon the said board, and who shall receive the same compensation as is allowed to the marshal for his attendance upon the District Court.

SEC. 6. *And be it further enacted,* That the said commissioners, when sitting as a board, and each commissioner at his chambers, shall be, and are, and is hereby, authorizetl to administer oaths, and to examine witnesses in any case pending before the commissioners, that all such testimony shall be taken in writing, and shall be recorded and preserved in bound books to be provided for that purpose.

SEC. 7. *And be it further enacted,* That the secretary of the board shall be, and he is hereby, authorized and required, on the application of the law agent or district attorney of the United States, or of any claimant or his counsel, to issue writs of subpoena commanding the attendance of a witness or witnesses before the said board or any commissioner.

SEC. 8. *And be it further enacted,* That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons

on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered.

SEC. 9. *And be it further enacted,* That in all cases of the rejection or confirmation of any claim by the board of commissioners, it shall and may be lawful for the claimant or the district attorney, in behalf of the United States, to present a petition to the District Court of the district in which the land claimed is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim; and such petition, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present claimants, and shall contain a deraignment of the claimant's title, together with a transcript of the report of the board of commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, a copy of which petition, if the same shall be presented by a claimant, shall be served on the district attorney of the United States, and, if presented in behalf of the United States, shall be served on the claimant or his attorney; and the party upon whom such service shall be made shall be bound to answer the same within a time to be prescribed by the judge of the District Court; and the answer of the

claimant to such petition shall set forth fully the nature of the claim, and the names of the original and present claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, copies of which answers shall be served upon the adverse party thirty days before the meeting of the court, and thereupon, at the first term of the court thereafter, the said case shall stand for trial, unless, on cause shown, the same shall be continued by the court.

SEC. 10. *And be it further enacted,* That the District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court, and shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States, on such security for costs in the District and Supreme Court, in case the judgment of the District Court shall be affirmed, as the said court shall prescribe; and if the court shall be satisfied that the party desiring to appeal is unable to give such security, the appeal may be allowed without security.

SEC. 11. *And be it further enacted,* That the commissioners herein-provided for, and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the

Supreme Court of the United States, so far as they are applicable.

SEC. 12. *And be it further enacted,* That to entitle either party to a review of the proceedings and decision of the commissioners hereinbefore provided for, notice of the intention of such party to file a petition to the District Court shall be entered on the journal or record of proceedings of the commissioners within sixty days after their decision on the claim has been made and notified to the parties, and such petition shall be filed in the District Court within six months after such decision has been rendered.

SEC. 13. *And be it further enacted,* That all lands the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims the said surveyor-general shall have the same power and authority as are conferred on the register of the land

office and receiver of the public moneys of Louisiana, by the sixth section of the act "to create the office of surveyor of the public lands for the State of Louisiana", approved third March, one thousand eight hundred and thirty-one: *Provided always,* That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same. *And provided, further,* That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the commissioner of the general land office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

SEC. 14. *And be it further enacted,* That the provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, or town,

or village lot, which city, town, or village existed on the seventh day of July, eighteen hundred and forty-six; but the claim for the same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town, or village was originally granted to an individual, the claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town, or village on the said seventh July, eighteen hundred and forty-six, being duly proved, shall be prima facie evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town, or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town, or village.

SEC. 15. *And be it further enacted,* That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

SEC. 16. *And be it further enacted,* That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.

SEC. 17. *And be it further enacted,* That each commissioner appointed under this act

shall be allowed and paid at the rate of six thousand dollars per annum; that the secretary of the commissioners shall be allowed and paid at the rate of four thousand dollars per annum; and the clerks herein provided for shall be allowed and paid at the rate of one thousand five hundred dollars per annum; the aforesaid salaries to commence from the day of the notification by the commissioners of the first meeting of the board.

SEC. 18. *And be it further enacted,* That the secretary of the board shall receive no fee except for furnishing certified copies of any paper or record, and for issuing writs of subpoena. For furnishing certified copies of any paper or record, he shall receive twenty cents for every hundred words, and for issuing writs of subpoena, fifty cents for each witness; which fees shall be equally divided between the said secretary and the assistant clerk.

Approved, March 3, 1851.

California Statutes, 1854–1855, pp. 48–49, Chapter XLIII (Passed May 11, 1854):

AN ACT declaring the Consent of the Legislature of the State of California to the Purchase by the United States of Signor, or Mare Island; to relinquish the Title and Interest of the State in overflowed portions of said Island, and to vest the Jurisdiction over the same in the United States, for the purposes therein specified. [Passed May 11, 1854.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. The consent of the State of California is hereby given to the purchase

by the United States of a certain tract or parcel of land situated in the county of Solano, known as Signor or Mare Island, for the purpose of erecting and maintaining thereon such arsenals, magazines, docks, dock-yards, and other military and naval structures as may be required for the use of the Government of the United States.

SECTION 2. The title and interest of the State of California to, and in such portions of the Island described in the preceding section as are overflowed beach, or swamp lands, on the eastern shore of the said Island, from the southern point thereof to a parallel intersecting the northern point of the highlands, and extending into the waters of the bay or straits, washing the eastern shore of said highlands of the Island to ship channel, is hereby relinquished and granted to the United States for the purposes specified in the preceding section; and the jurisdiction of such part of said Island, and the overflowed portions of the eastern shore thereof as are south of a parallel intersecting the northern point of the highlands, is hereby ceded by the State of California to the United States for the purposes aforesaid: *Provided,* That the consent to the purchase, and the grant and relinquishment of title, by this State to the United States, in this Act contained, shall not be construed in aid or support, directly or impliedly, of any conveyance or bond for title to the United States of the same lands heretofore made, or which may hereafter be made, by any person or persons, company or corporations, or as a recognition on the part of the State of California of any claim, title or grant heretofore asserted or set up, or which may hereafter be asserted or set up by any person or persons, company or corporation.

SECTION 3. The jurisdiction ceded to the United States in the last preceding section is upon the express condition that the State of California shall retain a concurrent jurisdiction with the United States in and over the said tract of land, so far as that civil process in all cases, and such criminal process as may issue under the authority of the State of California, against any person or persons charged with crime committed within or without said tracts of land, may be executed therein in the same way and manner as if this jurisdiction had not been ceded, except so far as such process may effect any of the real or personal property of the United States within the said tract of land; and all the lands and tenements within the limits aforesaid shall be, and continue forever hereafter, exonerated and discharged from all taxes, assessments, and other charges which may be imposed by authority of this State.

SECTION 4. The relinquishment made, the jurisdiction ceded, and the exemption from taxation granted by this Act, shall continue so long as the premises herein specified shall remain in the occupancy of the above United States of America, for the purposes mentioned in the first section of this Act, and no longer.

U.S. GOVERNMENT PRINTING OFFICE: 1937

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 487

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES E. O'DONNELL ET AL.

MEMORANDUM IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

The brief for the respondents in opposition seems to us somewhat to confuse the issues presented by the petition for a writ of certiorari. Accordingly, this memorandum in reply is respectfully submitted.

1. *Adverse Possession.*—The petition (pp. 29–33) presented the error of the court below in reversing the trial court without considering the ground of the trial court's decision—that the United States had acquired title to the lands in question by adverse possession. Respondents seek to justify this action by arguing, first, that consideration of the evidence *de novo* would indicate that the trial court erred in its finding of adverse and open possession (Br. 12–13). The record of-

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fers ample evidence to support the unequivocal finding of fact by the trial court (R. 171–172; see R. 328–329, 379–383, 583–590, 784–786, 800–838). While respondents dispute this finding, they offer only evidence, not in the record before this Court, which they prepared, that prior to 1914 "the United States had placed on the land only temporary improvements" (Br. 13). But plainly it is not necessary that improvements be permanent in nature if title is to be acquired by adverse possession. See *United States* v. *Oregon*, 295 U. S. 1, 25.

Respondents, however, seem to rest their case chiefly upon "the constant efforts of respondents and their predecessors * * * to enforce their rights to this property" (Br. 13). This contention is contrary to the express finding of the trial court (R. 197). It is, in addition, contradicted, in point of law, by the case relied upon by respondents and, in point of fact, by respondents' own statement.

A mere protest to Government officers is not sufficient in a case such as this to prevent the ripening of title by prescription. *Stanley* v. *Schwalby*, 147 U. S. 508, 517, suggests that "protest against the occupancy and application for redress in the proper quarter" might be sufficient if there were no judicial remedy. But here respondents have at all times had a judicial remedy, which they finally invoked in 1925. They had simply to obtain a writ of mandamus against the appropriate official and thus secure a patent to the lands; thereafter they

had full capacity to bring an action in ejectment. Since ultimately they did in fact successfully pursue this course, in *Work* v. *United States*, 23 F. (2d) 136 (App. D. C.), there can be no question as to the feasibility of such procedure to remove any incapacity to bring judicial action.

But even if mere protest were sufficient to bar title by adverse possession, it is to be observed that respondents' own statement (Br. 6, 13) shows that nonetheless such a title now vests in the United States. The United States took possession of the land in 1853, and has occupied it ever since (R. 171). Twenty years later, in 1873, the Secretary of the Navy was informed that "certain parties" claimed the land, and that the Federal authorities had been admonished not to take sand from the land. Six years later, in 1879, a formal protest was filed with the Surveyor-General and the Lands Commissioner by respondents' predecessors. Twenty-six years later, in 1905, judicial proceedings were finally commenced. In California a prescriptive title ripens in five years.[1] It seems plain that the United States acquired title by adverse possession not only once but many times over.

2. *Conclusiveness of the Decree.*—On this issue we think it important to point out that the re-

[1] Code of Civil Procedure, Secs. 315–325 (derived from Acts of 1850, p. 843). While a ten-year period applies to claims against the State or its grantees, upon issuance of the State patent (1857 in this case), the five-year period becomes applicable. *Wilhoit* v. *Tubbs*, 83 Cal. 279.

spondents do not dispute our main contentions. (a) It is not denied that the court below interjected the issue of fraud and misconduct by the United States in the absence of pleadings, proof or assignment of errors directed to this issue[2] (Pet. 14–15). (b) There is no argument that the United States was not in fact proceeding in good faith[3] (Pet. 15–18). (c) The respondents do not dispute that while the litigation was pending California not only knew of the purchase, but actually cooperated with the United States in its acquisition (Pet. 18).

Finally, as to laches, we wish to point out that respondents rely (Br. 12) on the same inadequate record of sporadic protest which we have discussed under the issue of adverse possession.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

NOVEMBER 1937.

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[2] The record references set out by respondents (Br. 12) relate, it should be noted, not to the issue of misconduct but to the asserted incapacity of the United States as trustee to acquire a title adverse to its alleged *cestui que trust.*

[3] Respondents state (Br. 7), but do not rely upon it in their argument, that not until 1930 was the District Court informed of the purchase of the claim of Bissell and Aspinwall. This is erroneous (Pet. 17).

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 487

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES E. O'DONNELL, ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 967) is reported in 91 F. (2d) 14.

JURISDICTION

The decree of the Circuit Court of Appeals sought to be reviewed was entered on October 22, 1936 (R. 1034). On November 19, 1936, petitioner filed a petition for rehearing, which was denied on June 7, 1937 (R. 1035). On August 19, 1937, an order was granted, extending the time for filing a petition for certiorari to and including October 7,

1937 (R. 1035). The petition for a writ of certiorari was filed on October 7, 1937, and was granted on November 8, 1937 (R. 103). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The Board of Land Commissioners for California and, upon review, the District Court for that State had before them in the 1850's a Mexican private land claim to Mare Island in San Francisco Bay, now a Federal naval reservation. If the Mexican claim failed, some swamp and overflow lands, a portion of which are here in controversy, would not be part of the public domain but instead, according to the view taken by the court below, would have passed to California under the general terms of the Swamp Act. The United States, while resisting the Mexican claim before the Board of Land Commissioners, purchased the whole property from the claimants in order to insure its use for naval purposes, but continued to resist the entire claim as it felt it was bound to do under the terms of the statute providing for the adjudication of native titles and in order to defeat the precedent which would be established by the validation of the Mexican grant, and for other reasons. But, because of the swamp land feature and the purchase of the property by the United States, the court below now takes a posi-

tion in favor of the successors of California, on the ground that the United States consciously and fraudulently engaged in a collusive suit, failed to resist the Mexican claim properly, and allowed decrees to go for the claimants, thus defeating the grant to California and securing for itself the swamp lands in question. Since 1853 the United States has occupied these lands and used them for military and naval purposes under claim of right and absolute ownership in fee. Accordingly, the three ultimate questions presented are—

(1) Whether, irrespective of all other contentions, the United States has acquired good title to the lands in dispute by adverse possession;

(2) Whether, apart from adverse possession, the decrees of the Board and District Court confirming the title to these lands as a part of Mare Island in the predecessors of the United States are conclusive upon respondents herein;

(3) Whether, apart from the decrees, the lands here in question as a part of Mare Island never passed to California and its successors under the Swamp Act—in view of the rule that tracts wholly claimed under alleged Mexican grants in California, irrespective of the subsequent action of the Board or courts in confirming or rejecting the claims, were entirely reserved from the operation of the Swamp Act.

Subordinate contentions under the second question are separately stated in the summary of the argument and in the argument proper.

STATUTES INVOLVED

The full text of the Act of September 28, 1850 (c. 84, 9 Stat. 519) granting to the states all swamp and overflowed lands of the United States (hereinafter called the "Swamp Act"); the Act of March 3, 1851 (c. 41, 9 Stat. 631) creating a board of land commissioners and providing for the determination of private land claims in the State of California (hereinafter called the "Mexican Claims Act"); and Chapter XLIII, Laws of California, 1854–1855, pp. 48–49, consenting to the purchase of Mare Island by the United States, are set forth in the Appendix, *infra*, pp. 95–106.

STATEMENT

The United States brought this suit in the District Court for the Northern District of California to quiet title to a tract of land on Mare Island, Solano County, California, which it has occupied since 1853 as a part of the Mare Island Navy Yard Reservation (R. 2–3). The court was asked to cancel a purported patent which had been issued by the United States to California (in compliance with a writ of mandamus from the Court of Appeals of the District of Columbia, R. 37–39, that court stating that "the mere issuance of a patent to California determines no legal or equitable right of the United States in the premises") and another issued by California to one Darlington in 1857 (R. 17), through whom the respondents herein claimed some interest in the land (R. 13). The historical

background, essential to an understanding of the case, may be concisely summarized as follows:

American military commanders in California, during the war with Mexico, officially proclaimed that Mexican land titles would receive due recognition from the United States,[1] thus foreshadowing the formal guarantees in the peace treaty and protocol of 1848.[2] Coincident, however, with this undertaking on the part of the United States, there was a firm resolve to defend the public domain in the new territory against invalid or fradulent claims, an attitude frankly stated during the treaty negotiations[3] and, indeed, very strongly held by influential groups in the Congress.[4]

After the treaty of peace and the admission of California into the Union as a state, the Mexican Claims Act of March 3, 1851, combining these elements of magnanimity and caution, carried out the treaty pledge by permitting all persons claiming

[1] Proclamation to the Inhabitants of California, July 7, 1846, at Monterey, by Commodore John D. Sloat, 29th Cong., 2d Sess., House Doc. No. 4, pp. 644–645; similar proclamation, August 17, 1846, at Ciudad de Los Angeles, August 17, 1846, by Commodore and Governor R. F. Stockton, *id.*, pp. 669–670.

[2] The treaty is in 9 Stat. 922–943; see esp. Articles VIII and IX. The protocol is in 61st Cong., 2d Sess., Sen. Doc. No. 357, pp. 1119–1120.

[3] On the attitude of this Government, see 30th Cong., 1st Sess., Sen. Ex. Doc. No. 52, pp. 83, 291–293.

[4] Congressional Globe, 31st Cong., 2d Sess., pp. 116–117, 157–160, 347–352, 403–408, 426–430, 438–439.

under Mexican or Spanish grants in California to seek confirmation of their claims before a commission composed of three members, and provided an "agent" to "superintend the interests of the United States."[5] Claimants or the Government could petition for review in the district courts and in the Supreme Court. Later, by the twelfth section of the Act of August 31, 1852, 10 Stat. 76 at 99, the Attorney General was put in charge of appeals from decisions of the Board adverse to the interests of the United States.

The Commission began its work in January, 1852, with a reminder by the General Land Office that "the great object of the Government, * * * is to ascertain, settle, and recognize all bona fide valid titles derived from the former sovereignties of the country and to detect, and forever put to rest, all fabricated, fraudulent or simulated grants."[6] The 813 claims totaled 19,148 square miles of land,[7] much of it of incalculable value and in densely populated areas. The Commission confirmed more than 500 claims, on "broad principles of equity."[8]

The present case arises out of the early adjudication of one of these Mexican claims. As found by

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[5] 9 Stat. 631, Sec. 4; see also provision for "associate law-agent," 10 Stat. 76, Sec. 12 at page 99.

[6] 32d Cong., 1st Sess., Sen. Ex. Doc. No. 26, pp. 2–6, at 2.

[7] The figure on the extent of the land involved is compiled from the materials in the Appendix in Ogden Hoffman, Reports of Land Cases, 1862.

[8] On the Commission's operations and adherence to "broad principles," see Joseph Ellison, California and the Nation, 1927, p. 15.

the trial court, the Mexican Governor of California on May 20, 1841, granted the entire island to Victor Castro. Bissell and Aspinwall, having succeeded to Castro's title under the grant, filed their petition before the Board of Land Commissioners seeking confirmation of their claim of title as provided in the Mexican Claims Act (R. 5, 164). Thereafter, proceedings were had, and on May 8, 1855, the Board entered a decree confirming claimants' title (R. 5–6, 164–165). The United States appealed from the Board to the District Court of the United States for the District of California, where the decree of the Board was affirmed and the claimants' title again confirmed (R. 7, 166, 167). Because of "accident, oversight, inadvertence or excusable neglect" (R. 21, 290), the decree of the court had not been signed or entered, and a decree nunc pro tunc as of March 2, 1857, was signed, filed and entered on April 15, 1930 (R. 20–22, 289–291).

On December 18, 1852, while these proceedings were still pending before the Board, Bissell and Aspinwall executed a contract to sell Mare Island to the United States (R. 308–312) and on January 4, 1853, joined in a deed conveying title to the Government for a consideration of $83,491.00 (R. 22–26, 168–169, 302–308). On February 28, 1853 they executed a bond in favor of the United States in the sum of $200,000.00 conditioned upon the validity of their contract and the conveyance of "the entire and absolute fee simple Estate in the said tract of land known as Mare Island" (R. 309), it being re-

cited in the bond that they "shall at all times hereafter indemnify and save harmless the United States against any claim or title to the said tract called Mare Island and its appurtenances which may be set up by or through any person or persons claiming under Victor Castro and his assigns or others represented by the said Wm. H. Aspinwall" (R. 310). The bond further recited that they should "also indemnify and save harmless the United States against any adverse claim or title in any other person or persons or body politic which may within two years from the date hereof be made and thereafter be successfully established" (R. 311).

Also, while these proceedings were still pending, on May 11, 1854, California consented to the purchase by the United States of the whole island, and in addition granted all its title and interest to and ceded its jurisdiction over certain other swamp lands on the shores of Mare Island. California Statutes, 1854–1855, C. XLIII, pp. 48–49.

Theretofore, on November 6, 1850, President Fillmore had reserved the island from public entry (R. 8, 328–329) and on February 9, 1853, the Secretary of the Navy had selected Mare Island for a Navy Yard and a Naval Depot, recommending that the "premises be reserved from public use." His selection had been approved and the lands reserved for naval purposes by the President on February 11, 1853 (R. 9, 381).

The United States has at all times since September 16, 1853, been in "actual, open, adverse, and exclusive" possession of the land "under claim of right and of absolute ownership in fee of said land, and under the title and color and claim of title," and has placed improvements upon the property here involved which exceed $1,250,000 in value (R. 10–11, 171–172).

However, on March 18, 1857, on the application of one Darlington who evidently assumed that under the Swamp Act the lands in question had passed to the state, California issued a patent to the tract (R. 30–33, 388; Plaintiff's Exhibit I–1, original). The patent was not recorded, however, until twenty-two years thereafter, June 6, 1879 (R. 33), when one Sawyer, formerly a clerk in the Navy Yard (R. 637) and then Chief Correspondence Clerk in the office of the Surveyor General of California (R. 634), appears to have acquired the Darlington claim. See *Sawyer* v. *Osterhaus,* 212 Fed. 765, 767. Respondents claim that, through conveyances from these parties, legal title is vested in them (R. 109–110).

The lands here in controversy include only a very small fraction of the island, embracing originally only 164 acres of swamp or overflowed lands on its shores (R. 163). Partly through accretion and partly by "filling in" operations, in the course of more than seventy years this fraction has grown to about 500 acres (R. 1010). Beginning in 1897, the

United States erected levees, dykes, and "fills" (R. 764, 784–785, 789, 796–797, 806, 811, 816, 855, 904) so that the tract is now about three feet above the mean high water line or "almost up to the yard grade" (R. 820).

By their amended answer (R. 100–121) respondents denied the Government's ownership of the lands here in controversy, and asserted title in themselves as tenants in common (R. 100). By specific denials they put in issue the existence and validity of the Castro grant (R. 101, 109), the validity of both decrees of confirmation (R. 101–102), the validity of the conveyance to the United States and of the Executive Reservation Orders (R. 102), and the prescriptive title of the United States (R. 104). The amended answer prayed "that the title of these defendants be quieted as against plaintiff (R. 121); and to support their prayer for such affirmative relief the respondents alleged that the lands in question were swamp lands which passed to California under the Act of September 28, 1850. Respondents' principal contention was, however, that the lands in question were not a part of Mare Island and not within the terms of the Castro grant (R. 101–103, 109, 117–119), and the greater part of the transcript of record herein is devoted to evidence given at the trial with reference to that contention.

The trial court made findings of fact and conclusions of law in favor of the United States and

against the defendants on all of the issues (R. 160–201) and gave a decree granting the relief prayed for by the United States (R. 202–206).

On appeal, the Circuit Court of Appeals for the Ninth Circuit reversed the decree, holding "that the United States has no title to the patented lands in suit and that the title is in and quieted in appellants" (R. 1034). Upon denial of the Government's petition for rehearing, the court amended its original opinion but reaffirmed its holding (R. 967–1009). Circuit Judge Haney dissented (R. 1009–1034, 1035).

In its opinion the majority held that the decrees of the Board of Land Commissioners and of the District Court on appeal in the case of *Bissell and Aspinwall* v. *United States*, in which the Castro title was confirmed in the claimants, are null and void because the United States had purchased the interests of the claimants while the proceedings were pending; that consequently these decrees have no value as proof of the validity of the title purchased by the United States from the claimants; and that therefore the entire record of the *Bissell and Aspinwall* case should have been stricken from the evidence in the instant case (R. 990–1004). They rejected petitioner's contention that the pendency of the Castro claim withdrew these lands from the operation of the Swamp Act and that therefore California acquired no title to the lands (R. 1004–1009). They held that the reservations made by

President Fillmore for military and naval purposes were ineffective because California had previously acquired an inchoate title under the Swamp Act, and they assumed to re-examine the original Mexican claim but on various grounds rejected as inadmissible all evidence offered as to its existence or validity. The court entirely ignored the findings of the trial court (R. 171–172, 179, 197–198) to the effect that the United States had acquired title to the lands in question by adverse possession.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the United States fraudulently colluded with Bissell and Aspinwall to deprive California of the lands in question.

2. In holding that, with reference to these lands, the United States was a trustee and California was its cestui que trust and that in the proceedings in *Bissell and Aspinwall* v. *United States* before the Board of Land Commissioners and the District Court it had a trust duty to perform which it deliberately violated in purchasing the property of the claimants in the pending proceedings and improperly defending the interests of its cestui, and that therefore California was not bound by the decrees.

3. In holding that California was a "third person" under Section 15 of the Act of March 3, 1851

(9 Stat. 631, ch. 41) and that, therefore, California and respondents are not bound by the decrees in *Bissell and Aspinwall* v. *United States.*

4. In holding that the proceedings in *Bissell and Aspinwall* v. *United States* were non-adversary and hence subject to collateral attack by California or respondents.

5. In holding that the United States, in seeking to have declared void the patent issued by the Secretary of the Interior to California, was subject to "more than ordinary burden of proof" applicable to suits to quiet title.

6. In holding that the lands in question were subject to the operation of the Swamp Act of September 28, 1850, despite the pendency of the Castro claim.

7. In holding that on September 28, 1850, by the Swamp Act, the United States transferred to California "the entire equitable interest in the lands" and even "whatever title it had to the swamp and overflowed lands here in question."

8. In holding that the signature of the district judge was necessary to the validity of the decree in *Bissell and Aspinwall* v. *United States,* and in holding that the decree was not effective as of March 2, 1857, or May 8, 1855.

9. In failing to hold that the respondents were barred from upsetting the decree in *Bissell and Aspinwall* v. *United States,* because of California's

acquiescence in the proceedings and because of the doctrine of laches.

10. In holding that the United States can take no benefit from the decree in *Bissell and Aspinwall* v. *United States,* and that the motion to strike from the evidence the judgment and record in that case should have been granted.

11. In holding that the decrees rendered in *Bissell and Aspinwall* v. *United States,* under the Act of March 3, 1851, c. 41, 9 Stat. 631, were not conclusive as against attack by California or respondents.

12. In failing to hold that the United States had acquired title by adverse possession.

13. In failing to affirm the decree of the District Court, in not quieting title in the United States, and in quieting title in respondents.

SUMMARY OF ARGUMENT

I

The United States has acquired title by adverse possession. The court below disregarded petitioner's claim of ownership by adverse possession, despite pleadings, proof, and specific findings to that effect by the trial court. It is well settled that adverse possession is an adequate basis for a suit in equity by the United States to quiet title. Since 1850 the lands have been reserved by presidential order and openly and notoriously used, occupied and improved for military and naval purposes

under claim and color of right and absolute ownership in fee. Under California law prescriptive title ripens in five years.

Respondents' defenses to the possession of the United States are wholly without merit. They at all times have had judicial remedy which they failed to invoke to secure for themselves any rights they might have had in the lands. Their protests to governmental officers in possession came too late and, in any event, were insufficient. Their claim that the United States held the lands as a trustee for California or respondents as the successors of California under the Swamp Act does not alter the situation, because both the federal and California courts hold that a trustee may acquire prescriptive title to land held in trust after open and unequivocal repudiation of the trust and actual knowledge thereof by the cestui, as is the case here.

II

The decrees of the Board of Land Commissioners in 1855 and, on appeal, of the District Court in 1857, rendered pursuant to the Mexican Claims Act and confirming the Mexican grant to Castro (of whom the United States is the successor by purchase), are valid, binding, and conclusive upon respondents as successors of California under the Swamp Act.

(1) Under the settled course of decision of this Court, California, as an alleged grantee of the lands

from the United States under the Swamp Act, is not a "third person" under the provision of the Mexican Claims Act regarding the effect of decrees rendered thereunder; and, therefore, respondents, as successors of California, are not the "third persons" who, under the terms of the Act, are free to attack the decrees rendered.

(2) The decree of the District Court, on appeal from the Board, is valid as of the date the court ordered its entry, 1857, despite the fact that it was neither signed nor "entered" until signed and entered nunc pro tunc as of 1857 on motion of the United States in 1930.

(3) The United States (contrary to the position of the court below throughout its opinion) was required to shoulder no "heavy" or "extraordinary" burden of proof to maintain its right to a decree quieting title in the lands. In any event, whatever burden could be put upon the United States under any rule of law has been amply satisfied by the evidence of record.

(4) The court below erred in holding that the United States had defrauded California by engaging in an asserted collusive suit before the Board and District Court in the proceedings under the Mexican Claims Act. There were no pleadings or proof of collusion between the United States and claimants under the Mexican grant and the question was neither raised nor submitted to the District Court herein nor to the court below. In any

event, the record shows that the United States conducted the proceedings in good faith, having a true adverse interest and fully disclosing its transaction with Bissell and Aspinwall. California by legislation assisted in and assented to the transaction.

(5) The court below erred in holding the United States to be a trustee for California under the Swamp Act, but in any event, even assuming a trust relationship, respondents, as the successors of California, are estopped by consent and acquiescence and barred by laches by reason of their long delay in seeking relief.

(6) The proceedings were in fact adversary in character since a genuine controversy remained despite the transaction between the United States and Bissell and Aspinwall. In any event, adversary proceedings were not required before the Board as an administrative tribunal. So far as the proceedings on appeal before the District Court were concerned, that court did not necessarily lose jurisdiction in view of the nature of the transaction, the stage of the proceedings at which it occurred, and the consequent discretion of the court in disposing of the matter. In any event, even assuming that the appeal failed for want of adversaries, the decree of the Board would still stand; and, under the settled course of decision, respondents are estopped to attack the jurisdiction of that court now, since they stood by for more than half a century and allowed the United States to reclaim

the land and make improvements of great value thereon.

(7) The validity of the Castro grant cannot now be reexamined as an original matter in view of the settled course of decisions of this Court.

III

Wholly aside from the questions of adverse possession or conclusiveness of the decrees, the Swamp Act did not grant to California any title to the lands here in question because that Act applied, under the applicable decisions of this Court, only to lands which, at the time it was passed, were of the public domain. California lands as to which there were Mexican claims outstanding, such as the Castro claim, were not parts of the public domain but were reserved and excepted from disposal under general grants by the United States. Hence, respondents' asserted source of title, the Swamp Act, passed no interest to California, from whom respondents derive their alleged title. Respondents are therefore wholly without any valid claim or title to the property.

ARGUMENT

I

THE UNITED STATES HAS ACQUIRED TITLE BY ADVERSE POSSESSION

The Circuit Court of Appeals completely disregarded petitioner's claim of ownership by adverse possession. Irrespective of any infirmities the

court below may have believed to inhere in the other sources of the Government's title, the record submitted to the court below indisputably proved that the United States is the absolute owner of the lands in question by reason of long, adverse, and exclusive possession of them.

It is well settled that adverse possession is an adequate basis for a suit in equity by the United States to quiet title. *United States* v. *Oregon,* 295 U. S. 1, 25; *Stanley* v. *Schwalby,* 147 U. S. 508, 517. Cf. *Sharron* v. *Tucker,* 144 U. S. 533; *Alexander* v. *Pendleton,* 8 Cranch. (12 U. S.) 461; *McCormack* v. *Silsby,* 82 Cal. 72, 76; *Baker* v. *Clarke,* 128 Cal. 181, 187; *President and Presiding Elder, Etc.,* v. *Goodwin,* 119 Cal. App. 37; *Park* v. *Powers,* 2 Cal. (2nd) 590.

The bill of complaint alleged that the United States has occupied the area here in dispute as a part of the Mare Island Navy Yard Reservation for military and naval purposes since the year 1853 (R. 3–4), its possession having "been actual, open, adverse, and exclusive and under claim of right and of absolute ownership in fee" (R. 10–11). Respondents disputed generally the ownership of the lands by the United States (R. 61, 75, 87, 100). But they did not deny the Government's possession, contending instead that "any possession of the premises * * * was secured by military force and trespass." Then, by way of affirmative defense, they pleaded that defendants "did everything they legally could to resist the intrusions and

trespasses of the plaintiff" (R. 65, 79–80, 91–92). See also Paragraph XXVII of Amended Answer (R. 115–116).

a. *Findings of trial court.*—With issue thus joined, the Government introduced evidence proving its alleged adverse possession (R. 328–329, 379–383, 466–467, 540, 546, 580, 583–590, 764, 767, 774, 784–786, 797, 806, 808). Respondents objected to none of this testimony, offered none to dispute it, and made no attempt to support their affirmative defense of protest.

The trial court thereupon found (R. 171–172) that:

> The possession of the United States of America has at all times been actual, open, adverse, and exclusive and under claim of right and absolute ownership in fee of said land, and under the title and color and claim of title * * * The lands * * * during such period of occupancy * * *, have been improved for military and naval purposes by the construction of buildings and improvements thereon. Said buildings and improvements are now actively and continuously used by the complainant for naval and military purposes and have been so used since the construction and making thereof and there is now located on the northerly portion of said land * * * a Marine Corps Rifle Range, a Submarine Repair Base, an Aviation Landing Field, a causeway to the Navy Yard, an overseas freight

shipment transit shed, Navy Yard scrap bins and storage, an electrified classification yard for railroad, storage corrals, moorings for destroyers, and many other buildings, structures and utilities, all of which were and are of a value exceeding $1,250,000 and were and are used by the complainant for the operation and activities of its naval and military force.

With reference to the affirmative defense pleaded by respondents, the court found (R. 197–198):

> It is not true that the possession taken by plaintiff of the premises embraced in Swamp and Overflow Survey No. 34 was secured by trespass or without right or color of title, and it is not true that until March 9, 1928, any of the defendants were without legal capacity to maintain any legal action or equitable proceedings to recover possession of said premises, or to quiet the title of them, or any of them, in or to said premises, or that defendants had no legal or equitable remedy to repel any alleged trespass or entry of plaintiff, or its officers, agents or attorneys. It is not true that defendants, or any of them, did everything they could to resist any entries, intrusions or alleged trespass of the plaintiff or its agents, prior to its acquiring said federal patent to the State of California.

See also Finding No. XXI (R. 179).

In their appeal, respondents assigned these findings as error (R. 912, 918, 923, 927) and argued

them in their brief to the Circuit Court of Appeals. Hence there is no basis for any assertion by respondents that "this is a new question raised by petitioner not considered by the court below" (Br. in Opp., p. 2). On the contrary, since the question was fully before it, the Court of Appeals was obliged to accept the findings of the trial court unless it appeared that they were clearly erroneous. *Borden's Co.* v. *Ten Eyck,* 297 U. S. 251, 261; *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451, 455; *United States* v. *Detroit Lumber Co.,* 200 U. S. 321, 329; *United States ex rel., Charley* v. *McGowan,* 62 F. (2d) 955, 957 (C. C. A. 9), affirmed, 290 U. S. 592; *W. H. Markell & Co.* v. *Mutual Ben. Life Ins. Co.,* 63 F. (2d) 193 (C. C. A. 9); *Collins* v. *Finley,* 65 F. (2d) 625, 626 (C. C. A. 9).

In not even considering the findings, as respondents admit was not done (Br. in Opp., pp. 2, 12), the court below prejudicially erred. Possibly the explanation for this course of the court below was the failure of Government counsel actively to urge this ground in support of the decision of the trial court. But the findings on adverse possession were put in issue by the appellants below themselves; the Government neither in brief nor argument conceded the point, and accordingly there was no justification whatever for the reversal of the trial court without considering this ground of its decision.

b. *The evidence.*—Respondents now ask this Court to "consider the evidence as in a trial *de novo*" (Br. in Opp. pp. 12–13). As has just been indicated, an appellate court will not disturb the findings of the equity trial court unless they are manifestly erroneous. But, even if the evidence should be reexamined here, there can be no doubt of the correctness of the trial court's findings.

It appears from the record that in 1850 President Fillmore, by Executive Order, reserved Mare Island for "public purposes" (R. 328–329) and again, in 1853, at the request of the Secretary of the Navy, for use as a "Navy Yard and Depot" (R. 379–383). Two years later, Captain Farragut, then in command of the new navy yard, constructed an artillery target "across the Tuly on the Northern end of the Island" (R. 774) and a road along the beach (R. 786). At the same time, a "borrow pit," from which sand has ever since been taken for building purposes, was started (R. 766–767). In 1858, a steam engineering building was erected, partly on the lands here involved, at a cost of $370,000, and that building still stands (Plaintiff's Exhibit G. G. original; R. 764, 766, 785, 786).

In 1873, when the question of the area of Mare Island first seems to have arisen, Admiral Rogers, then Commandant of the Yard, wrote to the Navy Department that the ownership of the tule lands was necessary in order for the Government to control the water front and prevent damage to the

harbor and to "hinder the establishment of objectionable manufacturies, or habitations for junkmen or liquor dealers" (R. 782). The matter was laid before the Solicitor of the Navy Department and on October 20, 1873 he advised that the United States had good title "to the whole of Mare Island, upland and marsh" and vigorously added:

> If any private claimant is in possession of any part of the island, he should be evicted. If the United States have not taken full possession of the Island, they should do so without delay (R. 540, 546).

Admiral Rogers then promptly advised the Register of the California State Land Office that "this land is claimed and occupied by the United States," and protested against the issuance of any patents by the State or "against any action antagonistic to the ownership and possession by the Navy Department of the United States" (R. 838–839). A similar letter was dispatched to the Board of Supervisors of Solano County, protesting against the consideration of a petition of "certain persons," then pending before the Board, "to adopt measures to reclaim Tule land appertaining to Mare Island" (R. 800–801). The protest seems to have been effective, for the record does not show that any attempt was made to reclaim the land except by the Government.

In 1877, United States Surveyor Freeman reported that "Several Iron Monuments are erected near the water's edge along the Northern boundary

with notices thereon forbidding persons to trespass on the lands, as they are claimed by the United States Government" (R. 580).

Improvements continued to be made, petitioner's evidence showing that up to the year 1931 sixty-one separate improvements have been made on the lands here in controversy, at a cost of almost $2,000,000 (Plaintiff's Exhibit G. G. original). Respondents' statement that all of the improvements made before 1914 were "temporary improvements" (Br. in Opp., p. 13) and that "permanent expenditures were not made until 1918" (p. 14), does not accurately reflect the record. Plaintiff's Exhibit G. G. Original, lists more than $800,000 worth of improvements made before that time, which, for the most part, are still in active and continuous use. Furthermore, it is plainly not necessary for improvements to be permanent in nature in order to acquire title by adverse possession. The California statute says, "usually improved." Section 325, California Code of Civil Procedure.[9] See also, *United States* v. *Oregon*, 295 U. S. 1.

[9] This section contains a proviso that the party must have paid all state, county, and municipal taxes levied and assessed upon the land, but it is immaterial here that no taxes have been paid since none were assessed (R. 477, *Spargur* v. *Heard*, 90 Cal. 221, 230; *Heilbron* v. *Water Ditch Co.*, 75 Cal. 117), and since in any event the United States is not subject to property taxation by the States (*Van Brocklin* v. *Tennessee*, 117 U. S. 151, 180; *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 504; *Irwin* v. *Wright*, 258 U. S. 219, 223).

The foregoing acts of ownership show that the United States acquired a valid prescriptive title under the laws of California by satisfying the requirements for such a title not only once but many times over, since in that state a "perfect title" is acquired by adverse occupancy for five years. Section 1007, Civil Code [10] and Sections 318–319, 320–325, 338, 343, Code of Civil Procedure; [11] *Akley* v.

[10] This suit is not affected by the recent amendment of Section 1007 of the Civil Code by Cal. Stat. 1935, p. 1592. The amendment is prospective in its language, precludes the acquisition of a prescriptive title only against a county, city, etc., does not apply to private owners or patentees, and its effect is limited to "possession by any person, firm or corporation."

[11] Section 318, provides:

> No action for the recovery of real property or for the recovery of possession thereof, can be maintained unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the property in question, within five years before the commencement of the action.

This provision was adopted on March 11, 1872, and was based on a statute of 1863 (Stats. 1863, p. 325), which appears to have been based on a statute of 1850 [2 Cal. Gen. Laws (Hittell, 1850–64) 4350], prescribing a five-year limitation period in somewhat different language.

Section 338, pertaining to actions other than for the recovery of real property, prescribes a limitation period of three years, *inter alia*, for actions for trespass upon or injury to real property and for actions for "relief on the ground of fraud or mistake." Section 343, pertaining to actions other than for the recovery of real property, prescribes, *inter alia*, a limitation period of four years for actions not otherwise provided for. Both of these sections were enacted on March

Bassett, 189 Cal. 625, 645; *Wutchumna Water Co.* v. *Ragle*, 148 Cal. 759, 764. This title extends not only to the lands physically occupied, but to the entire tract described in a "written conveyance" (such as the Bissell and Aspinwall deed), or "court decree" (such as the decrees given in the confirmation proceedings) upon which the claim or color of title is based (Section 322, Code of Civil Procedure).

c. *Respondents' remedy.*—Respondents may not defeat the force of this source of the Government's title by claiming that they had no available remedy by which to assert their rights until they secured a patent to the land in 1928, and that, by protesting to the Government officers, they exhausted every other method of preventing the ripening of prescriptive title in the United States.

In the first place, respondents may take no comfort from the dictum in *Stanley* v. *Schwalby*, 147 U. S. 508, 517, which suggests that "protest against the occupancy and application for redress in the proper quarter" might be sufficient to toll the statute if there were no judicial remedy. Here respondents at all times had at least the judicial remedy which they finally invoked in 1925. They had simply to obtain a writ of mandamus against

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11, 1872, and were based on a statute of 1850 (Stats. 1850, p. 346).

While a ten-year period applies to claims against the State or its grantees, upon issuance of the State patent (1857 in this case), the five-year period becomes applicable. *Wilhoit* v. *Tubbs*, 83 Cal. 279.

the appropriate official and thus secure a patent to the lands; thereafter they had full capacity to bring an action in ejectment. *Work* v. *United States*, 23 F. (2d) 136, (App. D. C.), is complete proof of the feasibility of the procedure at all times available to respondents.

In the second place, even if mere protest to Government officers were sufficient to bar title by adverse possession, the record shows that none the less a title by prescription has long ago vested in the United States. The United States took possession of the land in 1853 and has occupied it ever since (R. 171, 381, 769). It was not until 1879, twenty-six years later, that respondents' predecessors made any protest whatever (R. 583, 589).[12]

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[12] Respondents may take no comfort from this tardy protest as an effective objection to the adverse possession of the lands here involved by the United States. Reference to the terms of the protest (R. 584, 594) shows that it was limited to an objection to the approval of the Freeman survey of the Island made in 1877 under the direction of the Surveyor-General of the United States for California pursuant to the Act of July 1, 1864 (Ch. 194, 13 Stat. 332, 334) entitled "An act to expedite the settlement of titles to lands in the state of California" and which provided for the determination of the boundaries of all finally confirmed private land claims. Even for this purpose, the communication was ineffective since it failed to comply with the terms of the Act because (1) it was not made within ninety days from the first publication of the notice of the completion of the Freeman survey (R. 570–571), but almost two years after the ninety-day period had expired; (2) it did not state distinctly the interest of the objector or identify who the objecting parties were; (3) it was not accompanied with affidavits or other proofs as required by Section 1 of the statute.

No further protest is shown to have been made [13] until thirty-one years later, in 1910, when judicial proceedings were finally commenced. See *Work* v. *United States, supra*, p. 137. As pointed out above, under California law a prescriptive title ripens in five years, so that clearly these two sporadic protests were wholly ineffectual to preserve respondents' rights, if any, to the property here involved.

d. *Alleged trusteeship.*—Nor may respondents avoid the application of the doctrine of adverse possession by any suggestion that at one time the United States held the lands as trustee for California under the Swamp Act. The courts, both of the United States and of California, hold that a trustee can acquire prescriptive title to land held in trust, after open and unequivocal repudiation of the trust and actual knowledge thereof by the cestui que trust. *Speidel* v. *Henrici,* 120 U. S. 377; *Dugan* v. *O'Donnell,* 68 Fed. 983 (C. C. N. D. Calif.); *Norton* v. *Bassett,* 154 Cal. 411; see *Zeller's Lessee* v.

[13] The hearsay statement in the report of the Board of Civil Engineers to the Secretary of the Navy in 1873, that "certain parties actually claimed to own a portion of this tule" (R. 488) has no probative value in showing that respondents' predecessors were the "certain parties" referred to or that they protested against the occupancy of the tract here involved by the Government. The similar statement in Admiral Rogers' letter in the same year that "we have been admonished not to take sand" (R. 783) is likewise defective insofar as it may be relied upon to prove that respondents' predecessors made protest "in the proper quarter."

Eckert, 4 How. 288, 295; *Willison* v. *Watkins,* 3 Pet. 43, 47–48; *Love* v. *Watkins,* 40 Cal. 547, 568–572; see pages 60 to 65, *infra.* Here the record clearly shows that the United States unequivocally repudiated California's claim, by claiming and using the land for its own purposes at all times since 1853, and that California and its grantees had knowledge of this repudiation. Moreover, California was officially advised of the Government's claim of ownership at least as early as 1873, six years before the Darlington patent was recorded (R. 800–801, 838–839, 33).

Accordingly, it is submitted that the court below erred in refusing to affirm the decree quieting the title acquired by the United States through adverse possession and in directing that title be quieted in respondents.

II

THE DECREES OF THE BOARD OF LAND COMMISSIONERS AND OF THE DISTRICT COURT ARE CONCLUSIVE UPON RESPONDENTS

It is the position of the Government that the decrees rendered by the Board in 1855 and on appeal by the District Court in 1857 under the Mexican Claims Act in the case of *Bissell and Aspinwall* v. *United States,* confirming the Mexican private land grant to Castro (which was purchased by the United States from Bissell and Aspinwall, who were Castro's successors), are conclusive and

binding upon respondents who, as the successors of California, are claiming part of the lands under the Swamp Act.

(1) *The Court below erred in holding that California was a "third person" under the Act and that therefore respondents, as successors of California, were not concluded by the decrees of confirmation.*

It is the position of the Government that the statutory provision of the Mexican Claims Act that decrees of the Board, or of courts, on appeal from the Board, shall be "conclusive" between the United States and the claimants under Mexican grants applies to respondents as the successors of California. Under the steady course of decisions of this Court, California, as a grantee of the United States, is not a "third person" under the statutory exception (that such decrees "shall not affect the interests of third persons"). The assumed bad faith of the Government cannot serve to justify a novel interpretation of the statute.

To prove that the United States had acquired a valid title to the lands by purchase from Bissell and Aspinwall in 1857, petitioner, with respondents' consent (R. 216), gave in evidence the decrees of the Board of Land Commissioners and of the District Court, affirming the Board on appeal, in which it was adjudicated that the Government's grantors were the owners in fee of the property here in-

volved (R. 279, 285, 289). Each of these decrees was rendered pursuant to the Mexican Claims Act, "An Act to ascertain and settle the private Land Claims in the State of California." Petitioner thereupon contended that the United States was entitled to rely upon its deed, in view of the terms of Section 15 of the Mexican Claims Act of 1851, which provides:

> That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

The decided cases hold that California, as a grantee from the United States, was not a "third person" under this section. *Knight* v. *U. S. Land Association,* 142 U. S. 161; *San Francisco* v. *LeRoy,* 138 U. S. 656; *More* v. *Steinbach,* 127 U. S. 70; *Beard* v. *Federy,* 3 Wall. (70 U. S.) 478; *Los Angeles Farm & Milling Co.* v. *Thompson,* 117 Cal. 594; affirmed, 180 U. S. 72; *People* v. *San Francisco,* 75 Cal. 388, 400; *Ward* v. *Mulford,* 32 Cal. 365, 370.

In each of these cases it was held that those claiming under a title derived from the United States, as respondents do, are bound by the confirmation decrees rendered pursuant to the Mexican Claims Act. For example, in *Ward* v. *Mulford, supra,* the plaintiff, who claimed title under a con-

firmed grant from Governor Alvarado, as petitioner does here, brought ejectment against the defendant who, like respondents, claimed title under California to swamp lands in that state. The court held that the defendant could not question the plaintiff's title because California and those claiming under it were bound by the results reached in the confirmation proceedings, saying (371–372):

> The State of California came into the Union with her claim to the lands within her borders, such as she took by virtue of her admission under general grants to all states previously made by the Federal Government * * * subordinate to the prior equities of grantees under the former sovereign, and bound by such action as the Federal Government might take in ascertaining and settling such equities.

See to the same effect, *Knight* v. *U. S. Land Association*, 142 U. S. 161, 184.

On rehearing before the court below in the present case, respondents conceded the correctness of petitioner's contention, saying (R. 1026):

> Nor is it our contention that, in the ordinary sense, the State of California and its successors in interest are "third parties" within the meaning of Section 15 of the Land Commission Act. Were that question still open, we think it could be demonstrated that the State of California and these appellants were intended by Congress to be re-

> garded as "third persons" whose interests should not be affected by proceedings in confirmation. * * * But we concede that it has been decided otherwise by the Supreme Court in regard to this particular statute * * *.

But despite respondents' concessions and the unequivocal judicial pronouncements, the majority below held that because of exceptional circumstances, which they felt were presented in the instant case, it became necessary to depart from the settled rule and to hold that respondents, as grantees of California, are "third persons" within the meaning of Section 15, *supra*, and are not bound by the confirmation proceedings in the *Bissell and Aspinwall* case.

The court below assigned as its reasons, for departing from the adjudicated cases, that: (1) the decrees were fraudulently obtained with the "connivance" of the United States; (2) the Government "consciously violated" its duty as a trustee for California by purchasing the interests of the claimants while the proceedings were still pending; or (3) the decrees were rendered in non-adversary proceedings. It will be fully shown in later sections of this brief that there is not the slightest basis for any one of these assumptions, but even if they were well-founded, yet the presence of any or all of these factors would not justify the new interpretation given the fifteenth section of the Mexican Claims Act by the court below. For ques-

tions of the jurisdiction and validity of the proceedings of the Board and of the courts on appeal from the Board are quite different from questions as to the interpretation of Section 15. That section applies to certain fixed classes of persons and governs their rights and relations as to claims confirmed by the Board, or by the courts on appeal. Section 15 ought not be subjected to a novel interpretation by which the term "third person" may vary from circumstance to circumstance for the alleged reason that the Board rendered a void decision because of fraud, collusion, or violation of duty by the party litigants, or for lack of adversary parties, if such were necessary. *Lord* v. *Veazie,* 8 How. 251, on which the majority below relies, lends no support to the court's new interpretation of Section 15 of the Act, for it merely involved the propriety of declining to consider a collusive suit and had nothing to do with the interpretation of a statute regulating the effect of decrees.

It is submitted that the court below erred in its interpretation of Section 15.

(2) *The court below erred in holding that the decree of the District Court was of no legal effect as of 1857 on the ground that though it had been ordered by the court, it had not been signed and entered.*

It is the position of the Government that, although the decree ordered by the District Court in 1857 was neither signed nor entered (until April

15, 1930, when, on the ex parte motion of the United States, it was so signed and entered nunc pro tunc), it was nevertheless a valid and subsisting decree as of the time it was ordered in 1857.

However, the court below seems to have taken the view that the decree rendered by the District Court in 1857 was invalid because it was not at that time signed by the judge or entered on the court docket, and that therefore, petitioner must rely upon the decree as if rendered as of April 15, 1930. From this assumption the court proceeded to hold that this decree did not affect either the equitable or legal rights of respondents (R. 996) because they were not made parties to the action at the time the nunc pro tunc decree was obtained in 1930, no notice was given them, and it was "secretly obtained" (R. 971). Upon these holdings the court below bottomed many of its crucial rulings (R. 971, 976, 978, 979, 990–992, 1004) which will be discussed *infra*, but it is pertinent here to point out that the court clearly erred in failing to give effect to the decree rendered in 1857, signed and entered, nunc pro tunc, in 1930.

Under settled rules of law, the signature of the judge was not essential to the validity of the decree given in 1857, since his signature "is merely to give the clerk a surer means of correctly entering that which has been adjudged." *In re Cook*, 77 Cal. 220, 227; *Crim* v. *Kessing*, 89 Cal. 478, 489. Even where signature is required by statute (which is not the case here), the statute is not mandatory but

directory only. *Secombe* v. *Steele*, 20 How. (61 U. S.) 94, 102; *United States* v. *Stoller*, 180 Fed. 910, 912–913.

Similarly, the mere failure of the clerk to perform the ministerial act of entering the decree in 1857 in no way impairs its validity. The minute entries of the court show that an order directing the entry of the decree was made on March 2, 1857 (R. 290) and the unsigned decree is dated the same day (R. 285). Such entries were amply sufficient on which to base a decree, *Freeman on Judgments*, 5th Ed., Sec. 127; *Black on Judgments*, 2nd Ed., Sec. 135, for when a decree has been ordered or directed and "through inadvertence of either court or counsel omitted from entry" a decree nunc pro tunc is entirely proper. *Cuebas* v. *Cuebas*, 223 U. S. 376, 390; *Cf. Mitchell* v. *Overman*, 103 U. S. 62, 64–65. And it is customary for such decrees to be rendered ex parte. *Ware* v. *Kent*, 123 Ala. 427; *International Harvester Co.* v. *Carlson*, 217 Fed. 736, 738; *In re Wright, Petitioner*, 134 U. S. 136.

Even though the judge neglected to sign the decree which on March 2, 1857, he had directed to be entered in the *Bissell and Aspinwall* case, it is apparent that the proceedings in 1857 had finally terminated the litigation. If there were any doubt, it is removed by the fact that the United States Attorney on April 1, 1857, applied for and was granted an appeal to the Supreme Court of the United States (R. 287). The order was vacated on notice by the Attorney General that the appeal would not

be prosecuted (R. 286), but it is perfectly evident that the trial court would not have allowed an appeal if there had been any thought that the matter was still *sub judice.*[14]

It is therefore submitted that the decree rendered in the *Bissell and Aspinwall* case was valid from the date upon which it was given and ordered to be entered, March 2, 1857, and that, as the dis-

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[14] *Bouldin* v. *Phelps*, 30 Fed. 547 (C. C., N. D., Cal.), decided in 1887, was an ejectment brought, by another claimant under the Castro Grant, against the Commandant of the Mare Island Navy Yard. The United States was then permitted to submit—as against the new claimant—evidence acquired as to the fraudulent nature of Castro's claim. The new claimant relied upon the decrees in the *Bissell and Aspinwall* case, but the court used language (p. 578) to the effect that, in the *Bissell and Aspinwall* case, "there was a neglect to follow up the order for a decree by the entry of a final decree. * * * The confirmation had not reached the stage yet, where it has become *res adjudicata*, and can operate as an estoppel. There is as yet, no final decree. * * * The matters are, therefore, still *sub judice.*" This language, as the court admitted (p. 564), was wholly unnecessary to the decision, since the real question in issue was whether the new claimant under Castro was required to have successfully presented his claim to the Board under the Mexican Claims Act before he could maintain ejectment as against one who was the successor of a successful claimant before the Board. Moreover, the language was used to avoid the effect of a case decided thirty years before. It obviously cannot control the plain legal effect of an order directing the entry of a decree, and the fact that an appeal was allowed in 1857 excludes any possibility that the parties and the judge understood that the mere omission of a routine step would operate to keep the case alive for disposition by a future generation.

senting judge below aptly observed, the decree nunc pro tunc in 1930 "did nothing more than was already done" (R. 1017). *In re Wight, Petitioner,* 134 U. S. 136; *Monarch* v. *Brey,* 106 Ky. 688; *Fox* v. *Hale & Norcross Co.,* 108 Cal. 478; *United States* v. *Chicago & Alton R. Co.,* 250 Fed. 101; *International Harvester Co.* v. *Carlson,* 217 Fed. 736.

(3) *The court below erred in requiring that the United States assume an extraordinary burden of proof.*

It is the position of the Government that the United States was not required to prove its title by more than the ordinary burden of proof merely because one of the clouds sought to be removed from its title was a purported patent from the United States.

An erroneous premise which pervades the entire opinion of the court below is its view that in this action the Government was charged with a "heavy" or "extraordinary" burden of proof to maintain its right to a decree quieting title (R. 968, 973, 990, 996). The court took the position that the patent issued by the Secretary of the Interior pursuant to the writ of peremptory mandamus in *Work* v. *United States,* 23 F. (2d) 136 (App. D. C.) was a "solemn evidence of title" which can be avoided only upon the production of "that class of evidence which commands respect, and that amount of it which produces conviction" (R. 973).

Work v. *United States supra,* was an action brought by the same parties who are respondents herein, to compel the issuance of a patent to the State of California for the lands in controversy, upon the theory that those lands passed to California in 1850 under the Swamp Act. The Court of Appeals for the District of Columbia granted the writ with the following explanation (p. 138), which is exactly contrary to the view of the court below in the present case:

> The mere issuance of patent to California determines no legal or equitable right of the United States in the premises.

In so holding the District of Columbia court was clearly right, for it has long been settled that if lands, as in the case at bar, "never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them," a purported patent attempting to convey them "would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed," and may be impeached in any action. *Smelting Co.* v. *Kemp,* 104 U. S. 636, 641, 646. Such a patent "is a simple nullity." *United States* v. *Conway,* 175 U. S. 60, 68.

Surely there can be no reason for imposing a severe rule of proof upon one who would dispel whatever cloud may arise from such a nullity. Certainly the cases cited by the court below do not sanction any such requirement, for they all, unlike

the present case, involve instances wherein it was sought to attack the validity of a voidable patent covering lands subject to disposition and issued by mistake or upon fraudulent proofs. *Maxwell Land Grant Case,* 121 U. S. 325; *United States* v. *Stinson* 197 U. S. 200; *Wright-Blodgett Co.* v. *United States,* 236 U. S. 397. In such cases it is obvious why the courts are reluctant to disturb the "deliberate action of the tribunals to which the law commits the determination of all preliminary questions and the control of the processes by which this evidence of title is issued to the grantee." *Maxwell Land Grant Case, supra,* 379. But such reasons do not exist in the instant case, for the "deliberate action" of the Secretary of the Interior in determining the validity of the California-O'Donnell claim, was to refuse to issue the patent until coerced by the order of the court in *Work* v. *United States, supra.* And this order, it should be noted again, was issued upon the assumption that it determined "no legal or equitable right."

Furthermore, this Court has never required the party attacking a patent to show by more than a preponderance of the evidence that the lands were not a part of the patentable domain. Cf. *United States* v. *Stone,* 2 Wall. 525; *United States* v. *Schurz,* 102 U. S. 378, 404; *Knight* v. *U. S. Land Association,* 142 U. S. 161, 176, and cases cited. There is no valid reason for requiring more here, and the court below clearly erred in holding peti-

tioner to more than the usual burden of proof imposed upon a complainant in the ordinary suit to quiet title to lands, i. e., proof of the essential averments of the bill of complaint. *United States* v. *Oregon,* 295 U. S. 1.

This error on the part of the court below is important since it lies at the root of further holdings. Thus the court ruled that, in view of this "heavy burden," the United States had not convincingly proved the validity of the Castro Grant (R. 977); that the Government can take no "advantage" of the nunc pro tunc decree of 1930 (R. 990); and that "it is the Government which must lift appellants from their stance on the trustee-cestui relationship" (R. 996). All of these holdings will be fully analyzed later on their merits. It will then appear that whatever burden could be put upon the United States under any rule of law has been amply satisfied by the evidence of record.

(4) *The United States did not defraud California.*

The majority of the court below held that respondents may defeat the right of the United States to rest upon the conclusiveness of the decrees rendered in *Bissell and Aspinwall* v. *United States* "by showing that such a contention cannot be maintained with clean hands" (R. 971). Despite the fact that respondents had not attempted

to make such a showing, the court proceeded to find that the decrees of confirmation were open to attack because the United States had "connived" in procuring them by continuing to defend the case after purchasing the claimants' interests (R. 998). That there may be no mistake as to the grounds for its holding, the court below specifically stated (R. 996–997):

> Much of the comment on the conduct of the government [15] would not be warranted did it not insist that, by section 15 of the Act of 1851, creating the Land Commission, the record and decree in the Castro proceeding there are "conclusive" against California and its successors.

a. Total absence of pleadings or proof of collusion.—It is the position of the Government that—in the complete absence of allegations, proof, find-

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[15] The whole tenor of the court's opinion is colored with such phrases as "pretended controversy—sham proceeding (R. 969)—non-adversary action (R. 971)—ethical considerations (R. 974)—prosecuting its unified non-adversary claimant-defendant appeal—faked opponent (R. 976)—ethics involved—purposeful shift of position (R. 978)—pretended adversary proceeding (R. 990)—simulated opposition—reprehensible—pretended adversaries (R. 991)—judicial farce—pretended attorneys—concealed non-adversary proceeding (R. 994)—ethical significance (R. 995, 1004)—pretendedly opposed claim—connived at and procured a decree—supposed adversary government (R. 998)—one-party non-adversary action (R. 999)—violation of professional ethics involved (R. 1002)," and so forth.

ings, or specifications of error with respect to any fraudulent collusion on the part of the United States or its agents in resisting the Mexican land claim—the Circuit Court of Appeals herein erred in assuming, without giving the United States notice or an opportunity to bring out the true state of facts, that the Government fraudulently colluded with the claimants.

Although the question had not been raised or considered either in the trial court or when the matter was argued and submitted to the Circuit Court of Appeals, the majority of the court below injected as an issue and found that the United States was guilty of fraud in the *Bissell and Aspinwall* case—a finding of fact with no evidence to support it. By thus resolving factual questions against petitioner which had never been at issue in this case, the court below failed to observe the ordinary rules of fair procedure. Moreover, though the decree of the Land Commission and the confirmatory decree of the court were attacked as null and void in respondents' answer (R. 101, 102), and, on various grounds, by their motion to dismiss (R. 142–145), nowhere did their pleadings or proofs suggest any fraud, collusion, bad faith, or concealment on the part of the Government. Not one of the sixty-nine assignments of error presented such a contention (R. 909–938). At so late a stage of the proceedings, the United States was wholly pre-

vented from marshalling evidence to rebut the court's assumption.

Such a holding takes the United States by surprise, denies petitioner its day in court, condemns the Government without a hearing, and constitutes prejudicial and reversible error. In *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U. S. 257, the petitioners, on certiorari, complained as petitioner does here, that the Circuit Court of Appeals had disposed of their case "on questions not raised by either party, and not considered when this cause was submitted" and contrary to the "attitude of the trial court" (p. 265). In reversing the judgment of the Circuit Court of Appeals, this Court condemned such procedure in no uncertain terms (p. 267):

> * * * we are of opinion that it inevitably results that the effect of the action of the Circuit Court of Appeals was substantially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard.

No reason appears in justification of this action of the court below, and it is submitted that its decision, on this ground, constitutes reversible and fundamental error.

However, even upon the record herewith submitted, as will be shown next, the court below was

unwarranted in assuming that the United States, through the Attorney General and the Secretary of the Navy and their subordinates, were guilty of fraudulently "conniving" to deprive California of the lands in question.

b. Bona fide nature of the proceedings.—It is the position of the Government that the mere precautionary purchase by the United States of land involved in a Mexican land claim, which the Government was resisting and continued to resist before the Board of Land Commissioners, constituted no fraud upon California. The United States did, and had every reason to, continue a bona fide resistance to the Mexican claim. The terms of its purchase provided that, should the Mexican claim be defeated, the United States could recover the purchase price. Attorney General Cushing was "constrained, in the plainest dictates of public duty", to prosecute the case vigorously through the Federal courts since, as a precedent, the case would affect "many millions worth of land in California, which is otherwise public domain." By act of its legislature, California evidenced its willingness to grant similar swamp lands to the United States without charge in order to secure the creation of a naval base. The District Court and the State of California were fully advised of the Government's transaction.

The assumption that the United States purposely sought to deprive California of its rights by not

honestly combating the claim of Bissell and Aspinwall is absurd on its face because the Castro grant involved the whole of Mare Island, and, as will be shown, if the Mexican claim were dismissed, the United States would thereby secure for itself the whole island, including the swamp and overflow lands (Point III, *infra*), without cost. The only part of the island to which California had even a potential claim was that which was swamp and overflowed, far less valuable than the upland portion of the island; and even under the view taken by the court below, if the Castro grant were defeated, at least the valuable uplands would revert to the United States and not to California. Moreover, the claimants had given bond for "the complete establishment and security of the title in the United States" (R. 311), and if the Mexican grant were defeated, the Government, at any time thereafter, could have recovered the purchase price of $83,000 and whatever damages, to the extent of $200,000, it might have suffered from the invalid conveyance from Bissell and Aspinwall. Finally, there is small doubt that California, to secure the local establishment of a Federal naval station, would gladly have ceded to the United States these remaining swamp lands of small value, as it did other lands of Mare Island for these same purposes (California Statutes, 1854–55, ch. 43, p. 48).

The opinion of Attorney General Cushing, which the majority of the court below relies upon as evi-

dence of bad faith (R. 992) shows, first, that the Attorney General felt "constrained, in deference to the plainest dictates of public duty," to protect the interests of the United States by an appeal because, as a precedent, the case would affect "many millions worth of land in California, which is otherwise public domain." He felt bound, also, in this connection to make no admission that the purchase by the United States operated as an assent to the alleged validity of the Castro grant (8 Op. A. G. 422, 424). Secondly, it is clear that there was no idea of depriving California of its swamp lands since the Attorney General was of the opinion, erroneously, as it appears from subsequent decisions of this court (*Beard* v. *Federy, supra; United States* v. *Coronado Beach Co.,* 255 U. S. 472, 487–488), that the claim of California would not be settled by the proceedings before the Land Board, and he, therefore, advised that before any expenditure be made towards improving Mare Island, California be asked to cede the claims it might have, if any, to the shores and overflowed land (8 Op. A. G. at 426). If his assumption were correct, California could not be defrauded. Thirdly, it is also clear from Cushing's opinion that his predecessor, Attorney General Crittenden, had thought that the claim of Bissell and Aspinwall was of such seriousness that it should be purchased and that he had apparently given no thought to any possible ownership on the part of California (pp. 422–423).

Despite repeated assertions to the contrary in the opinion below, the record shows that while the *Bissell and Aspinwall* case was pending, the United States fully disclosed to the District Court the fact that the Government had purchased the interests of the claimants. Thus at page 8 of the first volume of the "Transcript of the Proceedings in Case No. 307, G. W. P. Bissell and William H. Aspinwall, Claimants vs. the United States" (Exhibit C, original) the following entry is found:

> The United States being now the owner of the titles of appellees, a confirmation of this claim enures to the benefit of government, and no objection is therefore made to a decree in favor of the validity of the claims.

It may be noted, also, that this disclosure is substantiated in the opinion of the Circuit Court in the case of *Bouldin* v. *Phelps,* 30 Fed. 547, 578 (C. C. N. D. Cal. 1887) of which more will be said hereafter.[16] Accordingly, petitioner submits that the

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[16] In that case, Judge Hoffman, who tried the *Bissell and Aspinwall* appeal, concurred in Judge Sawyer's opinion, wherein it was stated with reference to the Bissell and Aspinwall proceedings (p. 578):

"Besides, before the order for confirmation, the United States had purchased in any adverse claim, that the petitioners had compromised the adverse claim, so that the confirmation, under the authorities cited, would inure to the benefit of the United States * * * It was upon this idea expressed by the United States Attorney at the time, that, he stated, that there was no further objection to a confirma-

extravagant statements made by the court below which accuse the United States of waging a "concealed non-adversary proceeding in simulated opposition against a faked opponent" (R. 994, 991, 976) are fanciful and unwarranted. The trial court in *Bissell and Aspinwall* v. *United States* was thoroughly advised of the relationship between the parties before it.

Further evidence of the good faith of the officials is shown in the proceedings in *Bissell and Aspinwall* v. *United States,* which, as was customary before such boards, were not elaborate. The testimony of witnesses Cooper (R. 222–226), McDaniel (R. 244–245), and Mizner (R. 245–247), which the Government brought out, and the cross-examination by the Government of claimants' witness Alvarado,

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tion; upon which statement, the order for a decree of confirmation was made."

The omitted portion of the quotation reads: "It had, therefore, become a matter of indifference to the United States, whether the claim should be confirmed or rejected, as in one case the confirmation inured to its benefit; and in the other, the legal title then in the United States, continued to remain in them, as before, without even any adverse outstanding equity." It will be subsequently demonstrated that this language cannot be construed to mean that the proceedings were non-adversary (*infra*, pp. 65–74). The part of the opinion following the quotation in the text discusses the effect of the judge's failure to sign the decree in the *Bissell and Aspinwall* case. The erroneous character of the conclusions suggested in this discussion has already been indicated (*supra*, p. 38, n. 14).

was such as to cast on the minds of the Board "strong suspicions" of the validity of the Castro grant (R. 277). Collusive litigants would not offer such damaging testimony, and consequently the charge made by the court below that the depositions taken in the proceedings "show a most perfunctory cross-examination of the witnesses" (R. 991) is entirely gratuitous. Furthermore, it is submitted, if fraud is to be predicated upon the belief that an adequate battle was not made, no decree will hereafter be safe from collateral attack.

Moreover, the court below had before it conclusive evidence that California knew of and had consented to the purchase of the Bissell and Aspinwall interests, in the terms of an act of consent passed by California on May 11, 1854 (California Statutes, 1854–55, c. 43), some months prior to the taking of testimony and a year prior to the decree of the Board. Section 1 consents to the purchase of Mare Island by the United States for naval purposes. Section 2, in addition to ceding certain other swamp lands, provides that this consent and grant shall not operate to the "aid or support, directly or impliedly, of any conveyance or bond for title to the United States of the same lands heretofore made"—obviously referring to the Bissell and Aspinwall conveyance and the terms of their bond to the United States. There is no intimation anywhere in the proceedings of "any conveyance or bond * * * to the United States * * * heretofore made"

other than that of Bissell and Aspinwall (conveyance, R. 302; bond, R. 308). In other words, if the grantors did not make good their claims in the proceedings on the Mexican claim, the United States would not be precluded by this state statute from recovering under that portion of the bond which provided that the grantors "shall also indemnify and save harmless the United States against any adverse claim or title in any other person or persons or *body politic*" (R. 310). [Italics supplied.] California was interested in aiding the United States in order to secure the establishment of the naval reservation, but at the same time took pains to make sure that its cession of interest to the United States would not deprive the Government of its rights under the bond and thus inure to the benefit of Bissell and Aspinwall.

Obviously, the imputation of collusion, bad faith, and fraud in the United States is wholly unfounded. Indeed, despite the lapse of eighty years, the record is remarkably clear as to the good faith of the Government.

(5) ***The United States was a mere donor and not a trustee for California; moreover, if the United States were a trustee, respondents as the successors of California are both estopped and barred by laches.***

It is the position of the Government that the United States, in resisting Mexican land claims under the Act of 1851, was not charged with the duties

of a trustee for California whenever swamp lands were involved, merely because they had been granted to California by general statute. Instead, the United States was a mere donor of the swamp lands and had not specified or ascertained what lands were swamp nor yet conveyed legal title. However, assuming that the United States was charged with the duties of a trustee, the successors of California are now estopped from attacking the conclusiveness of the decrees or the validity of the title purchased by the Government, because of full knowledge, acquiescence and consent. Moreover, again assuming not only that the United States was a trustee but that it violated its duty to its alleged cestui in purchasing the title of a private land claimant, the successors of California are now barred by laches from collaterally attacking the decrees—because no steps of any sort had been taken by them (for more than seventy years) to attack the decrees or (for more than fifty-seven years) to disturb the Government's possession, despite the fact that the United States unequivocally repudiated any trust duty imposed upon it, notoriously and exclusively occupying the trust res at all times since 1853 for military and naval purposes under claim of ownership.

a. *The United States a donor, not a trustee.*—The majority below adopted the untenable theory that, under the Swamp Act of 1850, the United States held legal title to the lands in question as trustee

for California. It therefore held that, since, as it assumed, the Government deliberately violated a trust duty to its cestui by purchasing Bissell and Aspinwall's interests, the United States could take no benefit from the decrees.

However, in order to create a trust relationship, an intention to assume the duties of a trustee must be either manifested or fairly implied from the facts (Restatement of the Law of Trusts, Secs. 2, 23). No provision in the Swamp Act of September 28, 1850, indicates that the United States either assumed any fiduciary relationship or in any way undertook to hold and protect these lands for the use and benefit of its grantees in the technical manner of a trustee. The Government was merely a donor. It was gratuitously divesting itself of parts of its domain for specific purposes and even then only to those who would comply with the conditions imposed by the Act. It may have passed on to the states a beneficial interest in the swamp land, but like a vendor of land who has not transferred legal title [17] or like an ordinary mortgagee holding legal title [18] the United States did not become a trustee in any sense.

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[17] *Rayner* v. *Preston*, 18 Ch. D. 1, 10; Restatement of the Laws of Trusts, Sec. 13; Williston, The Risk of Loss, 9 Harv. Law Rev. 106, 117n.; *cf.* 1 *Bogert, Trusts and trustees*, § 18.

[18] *Field* v. *Debenture Corp.*, 12 T. L. R. 469; *King* v. *State Mutual Fire Ins. Co.*, 7 Cush. (Mass.) 1, 7; *Dennett* v. *Tilton*, 227 Mass. 299; see *Taylor* v. *Russell* (1892), A. C. 244, 255; Restatement of the Law of Trusts, Sec. 9; 1 *Bogert op. cit.*, § 29.

Thus it has been held, despite the proviso to Section 2 of the Swamp Act to the effect that the proceeds of swamp lands sold by the state should be applied to reclamation by levees and drains, that no trust for this purpose was thereby attached to the lands. *Mills County* v. *Railroad Companies*, 107 U. S. 557. Similarly, under an 1855 statute providing that the proceeds of swamp lands sold by the United States subsequent to the passage of the 1850 statute should be paid over to the states, it was held that "the proceeds of the swamp lands are not subject to a property trust * * * in the hands of the United States." *United States* v. *Louisiana*, 127 U. S. 182, 191.

No authority has been found to intimate in any way that the United States was charged by the Act with the obligations of a trustee. Certainly neither the cases cited by the court below (R. 991–992) nor by the respondents (Br. in Opp., p. 10) give support to such a rule. Whether or not the United States was charged with the duties of a trustee for the benefit of its grantees under the Act in question or acts similar to it was not involved in any of these cases and they are clearly not in point.

It is true that there are general statements in some of the cases, upon which respondents rely, to the effect that the United States held legal title to public land grants "in trust" for settlers who had fully complied with the terms and conditions of the land laws, but it is obvious that the Court did not in any of them intend to hold, even if the issue

had been before it, that the United States was a trustee in the true sense of that term. Such language is a "loose inaccurate use of the word 'trust'," (*Bogert, op. cit.* § 18), just as it is frequently used in cases involving a vendor-vendee or mortgagor-mortgagee relationship. In neither of these situations is the vendor or mortgagor a trustee, as pointed out above.

Thus, in the case of a contract for the sale of land, the vendor himself has a security interest until the purchase price has been paid, and at no time are the remedies of the vendee exclusively equitable as are those of the ordinary beneficiary of a trust. He has a cause of action at law for breach of contract, of equal importance with his right to specific performance in equity. *Way* v. *Root,* 174 Mich. 418. Even after the whole purchase price has been paid, the equitable duty of the vendor to convey arises out of contract and not out of a trust (*Bogert, op. cit.* § 18, p. 76):

> Express trusts are created because of an actual intent that they shall exist, expressed by the settlor. It is a strained construction of an ordinary land contract to say that either seller or buyer actually intended that during the course of the execution of the contract either party was to be a trustee for the other.

The same is true in the case of a mortgagor-mortgagee relationship. In *Taylor* v. *Russell* (1892), A. C. 244, Lord Herschell said (p. 255):

> No authority was cited for the proposition that a mortgagee is, subject to his security, a trustee of the legal title for the mortgagor. The rights of a mortgagor are no doubt well established in a court of equity. He may redeem the mortgage, and no dealings with the property by the mortgagee, save a conveyance under the power of sale, can deprive him of this right. But it is quite a different proposition and one which I think is wholly untenable to assert that a mortgagee is trustee for the mortgagor. It is admitted that a mortgagee may create such estates as he pleases, he may convey, by way of sub-mortgage, to whom and in as many parcels as he pleases.

While it is true that in *Knight* v. *U. S. Land Association, supra,* this Court expressed the opinion that the United States held tide lands[19] acquired from Mexico "in trust" for the future state (p. 186), in the same breath it referred to the duty of the United States to the Mexican claimants (pp. 186, 200, 201) and said that the latter duty

[19] It is to be noted that there is a wide difference between tide lands and swamp and overflowed lands, which are uplands. As to tide lands, the Court said (p. 183), the original states and those admitted thereafter are possessed of "absolute property in, and dominion and sovereignty over, the soils under the tide waters * * * *Martin* v. *Waddell*, 16 Pet. 367, 410; *Pollard* v. *Hagen*, 3 How. 212, 229; *Goodtitle* v. *Kibbe*, 9 How. 471, 478; *Mumford* v. *Wardwell*, 6 Wall. 423, 436; *Weber* v. *Harbor Commissioners*, 18 Wall. 57, 65." *Cf. Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10, 22, where this Court pointed out that "there is no question that the United States was free to convey the upland."

was superior to the former (pp. 186, 200, 201). Furthermore, here again it cannot be said from this loose use of the term "trustee" this Court meant that the United States was technically a trustee for anyone. Obviously, the only obligation of the United States was to see justice done. In the same sense it might be said that the United States holds all of its power in trust for its citizens. In such a sense, of course, the mere use of the word "trustee" cannot suspend the operation of the normal rules of law which govern the relations of the United States with the states and citizens, since then the technical field of trusts would supercede the whole body of public law.

Accordingly, it is submitted, the attempt of the majority of the court below to erect a trust relationship must fail completely and its conclusion that the United States consciously violated its duty to its cestui (R. 992) collapses.

b. *Even as cestuis, respondents are estopped.* Even if the Circuit Court were correct in its view that the United States was a trustee, the holding that the respondents may now attack the validity of the decrees is unsound. California, as has been shown above (pp. 51–52), by its act of cession and consent (California Statutes, 1854–55, c. 43, p. 48), freely and voluntarily consented to the purchase, with full knowledge of its extent and terms, and through its legislature actively cooperated to preserve the rights of the United States in the transaction. Therefore, respondents as the successors of California are now estopped from attacking or

otherwise repudiating the consent of their grantor, for it is a fundamental principle that a cestui, who, with full knowledge of the facts, has consented to or acquiesced in any conduct on the part of his trustee, is thereafter barred from objecting to such conduct or setting it up as a breach of trust. *Butterfield* v. *Cowing*, 112 N. Y. 486; *Pope* v. *Farnsworth*, 146 Mass. 339, 344; *Walker* v. *Doak*, 210 Cal. 30; *Turner* v. *Fryberger*, 99 Minn. 236; 4 *Bogert, op. cit.*, §§ 941, 942; Perry, Trusts and Trustees (7th Ed.), §§ 195, 849. Additional authorities to the same effect are cited in the margin.[20]

Under the authority of these cases it is submitted that the rule relied upon by respondents that a trustee is under an "absolute disability" from acquiring "a personal interest in the subject matter of the trust" (Br. in Opp. p. 10), has no application to the case at bar. As was said in *Ungrich* v. *Ungrich*, 115 N. Y. Supp. 413, affirmed 207 N. Y. 662 (p. 417):

> Of course, it is true as a bald proposition that a trustee cannot deal to his personal advantage with the property of his trust. It is likewise true that a cestui que trust cannot allege an act upon the part of his trustee to

[20] *Preble* v. *Greenleaf*, 180 Mass. 79; *In re Niles*, 113 N. Y. 547; *In re Hall*, 164 N. Y. 196; *Law* v. *Barnes* (R. I.), 116 At. 209; *Meier* v. *Union Trust Co.*, 93 Ind. App. 457; *In re Armitage's Estate*, 195 Pa. St. 582; *Cf. Laughlin* v. *Mitchell* (C. C. S. D. Miss.), 14 Fed. 382, aff., 121 U. S. 411; *Davis* v. *Harrison*, 240 Fed. 97 (C. C. A. 9).

> be a breach of trust which has been done under his sanction or procurement or concurrence. * * * The plaintiff having sanctioned and assented to the transaction and concurred in the transfer to the property * * * and having understood all the facts and no deception having been practiced upon him, he is bound by such sanction * * *.

See to the same effect *Colburn* v. *Hodgdon*, 241 Mass. 183; *Marcum* v. *Wallace*, 246 Ky. 746; *In re Bauer's*, 17 Cal. App. (2d) 426; Cf. *First Savings Bank & Trust Co.* v. *Greenleaf* (C. C. A. 8), 294 Fed. 467; *Cardoner* v. *Day*, 253 Fed. 572 (N. D. Ida.), aff. *Wilson* v. *Day*, 260 Fed. 788 (C. C. A. 9).

Accordingly, assuming the existence of a trust relationship, respondents as the successors of California are estopped by acquiescence and consent.

c. *Even as wronged cestuis, respondents are barred by laches.*—Furthermore, even if all that the court below assumed as to breach of duty by the United States as a trustee be conceded, California and its successors, as cestuis, could not stand by for an undue length of time while the United States made large expenditures in improving the land, and then hope to avoid the decrees [21] on the faith of

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[21] The rule that laches does not operate against a State (*Gaussen* v. *United States*, 97 U. S. 584; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389) is not applicable here because the claim originally held by California was transferred to Darlington in 1857 (R. 388) and has been owned solely by private persons since that time. See *Wilhoit* v. *Tubbs*, 83 Calif. 279.

which the improvements were made. Cestuis, as well as other litigants, may be barred, under the doctrine of laches, by reason of their long delay in seeking relief from the action of their trustees. *Bogert, op. cit.* p. 2742.

Thus, in *Wagner* v. *Baird*, 7 How. 234, 257–258, in affirming dismissal of a bill brought for the recovery of trust property, after a delay of forty years, this Court said:

> There is a defense peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitations directly covers the case. In such cases courts of equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights or long acquiescence in the assertion of adverse rights. (2 Story, Eq., Section 1520). A court of equity will not give relief against conscience or public convenience where a party has slept upon his rights. "Nothing," says Lord Camden (4 Bro. Ch., 640) "can call forth this court into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive and does nothing." Length of time necessarily obscures all human evidence and deprives parties of means of ascertaining the nature of original transactions; it operates by way of presumption in favor of the party in possession.

Since the United States was in open and undisputed possession of the land since 1853, respondents and their predecessors are now chargeable with lack of diligence. As this Court said in *Hume* v. *Beale's Executrix*, 17 Wall. (84 U. S.) 336, in affirming dismissal of a suit for alleged breach of trust, brought thirty-seven years after the act complained of (p. 349):

> Why have these complainants slept upon their rights for this great length of time and why have they delayed invoking the aid of a court of equity until a person charged with misconduct is dead? It is plain this unusual delay places them on the defensive, and requires satisfactory explanation before they can obtain relief.

In *Patterson* v. *Hewitt*, 195 U. S. 309, a suit to enforce a trust was dismissed because of eight years' delay in bringing it and the expenditure of large sums of money by the defendants in developing mining property there involved, although the period of the statute of limitations was ten years. The Court said:

> Some degree of diligence in bringing suit is required under all systems of jurisprudence. In actions at law, the question of diligence is determined by the words of the statute. If an action be brought the day before the statutory time expires, it will be sustained; if a day after, it will be defeated. In suits in equity the question is determined by the circumstances of each particular case. The

> statute of limitations consorts with the rigid principles of the common law, but is ill adapted to the flexible remedies of a court of equity. The statute frequently works great practical injustice—the doctrine of laches, never. True, lapse of time is one of the chief ingredients, but there are others of almost equal importance. Change in the value of the property between the time the cause of action arose and the time the bill was filed, complainant's knowledge or ignorance of the facts constituting the cause of action, as well as his diligence in availing himself of the means of knowledge within his control, are all material to be considered upon the question whether the suit was brought without unreasonable delay.

Additional authorities to the same effect are cited in the margin.[22]

Respondents may not take refuge under the protecting cloak spread by courts of equity over cestuis who are unaware of the repudiation of their trust, for California and all its successors well knew that the United States claimed this land for its own use in the conduct of its military and naval operations, notoriously disavowing any trust re-

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[22] *Percy* v. *Cockrill*, 53 Fed. 872, 875 (C. C. A. 8) (fifteen years); *Froneberger* v. *First Nat'l Bank*, 203 Fed. 429 (C. C. A. 4) (forty years), and the following California cases which gave effect to the same doctrine: *Kleinclaus* v. *Dutard*, 147 Cal. 245, 249 (thirty-five years); *Cowan* v. *Union Trust Co.*, 38 Cal. App. 203, 204 (three years); *Baxter* v. *King*, 96 Cal. App. 415 (thirty-nine years); *Lichtenberg* v. *Burdell*, 101 Cal. App. 20, 48 (twenty-four years).

lationship which may have been imposed upon it.[23] This being true, a delay many times over that prescribed by the statutes of limitation of California (California Code of Civil Procedure, §§ 318, 338, 343)[24] for barring causes of action has barred respondents and their predecessors from attacking the decree of confirmation rendered in *Bissell and Aspinwall* v. *United States* in 1857. *Phillipi* v. *Phillipe,* 115 U. S. 151, 156–157; *Speidel* v. *Henrici,* 120 U. S. 377, 386.[25]

Nor may the imputation of laches be avoided by any contention that respondents and their predecessors "have actively and continuously asserted their rights" ever since 1873 (Br. in Opp. p. 12). As has been shown (*supra,* pp. 27–29), the record affords no basis for such a contention. Respondents or their predecessors took no steps to assert their rights. The road was open to California, to Darlington, and all their successors, to pursue the remedy obtained in *Work* v. *United States,* 23 F. (2d) 136 (App. D. C.). But respondents did not even attempt court proceedings prior to the unsuccessful ejectment action, *Sawyer* v. *Osterhaus,* 212

[23] "Laches is not excused by simply saying 'I did not know.' If by diligence a fact can be ascertained the want of knowledge so caused is no excuse for a stale claim." *Taylor* v. *Coggins,* 244 Pa. 228, 231; *Redford* v. *Clark,* 100 Va. 115, 122.

[24] See note 11, page 26, *supra.*

[25] See, to the same effect, *Swift* v. *Smith,* 79 F. 709, 714 (C. C. A. 8) (twenty years); *Robb* v. *Day,* 90 F. 337 (C. C. A. 6) (twenty-three years); *Benedict* v. *City of New York,* 247 F. 758, 767 (C. C. A. 2) (seventeen years); *Ewald* v. *Kierluff,* 175 Cal. 363 (forty-three years).

Fed. 765 (N. D. Cal.), instituted in 1910. See *Work* v. *United States, supra,* p. 137. They made only two protests, the first twenty-six years after the United States had taken possession, and the second thirty-one years later.

Under such circumstances, the decision of this Court in *Wagner* v. *Baird,* 7 How. (48 U. S.) 234 258, is precisely applicable. In that case the Court said:

> Long acquiescence and laches *by parties out of possession* are productive of much hardship and injustice to others and cannot be excused but by showing some actual hinderance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the Chancellor. The party guilty of such laches cannot screen his title from the just imputation of staleness *merely by the allegation of an imaginary impediment or technical disability.* [Italics supplied.]

Respondents having slept too long on their rights, if any, equity will not permit them to attack the decrees. *Hammond* v. *Hopkins,* 143 U. S. 224, 250; *Wetzel* v. *Minnesota Railway Company,* 169 U. S. 237; *Clark* v. *City of Chicago,* 70 F. (2d) 172, (C. C. A. 7).

(6) *There was no lack of required adversary proceedings.*

It is the position of the Government that the record here presented shows that the requirements of adversary proceedings were fulfilled throughout

the proceedings before the Board and on appeal before the District Court, and that, in any event, the Board was an administrative tribunal empowered to dispose of land claims even upon ex parte procedure.

As another ground for ruling that the United States can take no benefit from the decree in the case of *Bissell and Aspinwall* v. *United States,* the court below held that (R. 971):

> the decree is not binding upon appellants because it was given in a non-adversary action in which the claimant and defendant were one, and hence no justiciable issue existed upon which adjudication could be had

and that (R. 1004):

> the motion to strike from the evidence the judgment and record in the *Bissell and Aspinwall* case should have been granted, because, as soon as the Castro title was acquired by the United States, that case presented no issue of an adversary character upon which the District Court or the Land Board could take jurisdiction.

These rulings are clearly erroneous for several reasons.

a. *There was a genuine controversy.* –Above, in discussing the charge of bad faith, facts and considerations have already been set forth which conclusively demonstrate that the proceedings both before the Board and the District Court were based upon a genuine controversy (*supra,* pp. 46–52). Among those considerations was the fact that Bis-

sell and Aspinwall were under bond for $[illegible]00,000.00 to furnish a good title to the United States (R. 308). Had the claim been declared invalid, the United States could at the least have recovered the purchase price of $83,491.00 (R. 303). Furthermore, the United States felt bound to resist the claim in order to defeat a precedent which would affect "many millions worth" of public land (*supra*, p. 46).

It seems unnecessary to dwell further on these matters, and the facts adduced above should fully dispose of the point. There are, however, further considerations.

b. The decree of the Board.—The purpose of the Mexican Claims Act, under which the Bissell and Aspinwall proceedings were brought, was expressed in its title: "An Act to Ascertain and Settle Private Land Claims in California"—a function requiring no controversy. The view of the majority below (R. 1000), that the Board's duty was to dispose of justiciable issues between adverse litigants, both disregards the express purpose of the Act and ignores the applicable decisions of this Court. The Board was an administrative tribunal. *United States* v. *Ritchie*, 17 How. (58 U. S.) 525; *Grisar* v. *McDowell*, 6 Wall. (73 U. S.) 363; *United States* v. *Fossatt*, 21 How. (62 U. S.) 445. Since the statute under which it was created did not require adversary proceedings, none were necessary. *Foster* v. *Neilson*, 2 Pet. (27 U. S.) 253; *Tameling* v. *U. S. Freehold, Etc. Co.*, 93 U. S. 644.

The court below seems (R. 1000) to have been misled by the provision of the Act providing for the attendance of an "agent" of the United States. This provision, however, looked only to the presence of a representative of the Government to "superintend the interests of the United States in the premises" (Sec. 4). Even had there been provision for the participation of regular law officers of the United States—such as the Attorney General and the United States Attorneys—this would not have determined the nature of the proceedings.

Nor is there anything in Sections 9 and 10 of the Act providing for a procedure for a review of the decrees of the Board, which justifies the interpretation put upon the Act by the court below (R. 1000–1001). Merely because Congress has provided for review by constitutional courts, where such review may fail because it is wanting in adversaries, it does not follow that the decree of the administrative tribunal will also fail. *Keller* v. *Potomac Electric Co.*, 261 U. S. 428; *Radio Commission* v. *General Electric Co.*, 281 U. S. 464; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693; *Ex Parte Bakelite Corp.*, 279 U. S. 438. Particularly is this the case where, as here, the tribunal is set up to determine the political or international obligations.[28]

[28] The situation here is different from that disclosed in *Muskrat* v. *United States*, 219 U. S. 346, and similar cases cited by the court below (R. 1004). The natural presump-

To support its view that a justiciable controversy was required, the majority below were obliged to rely on general language from cases in which the question was not involved (R. 1001) such as *Botiller* v. *Dominquez,* 130 U. S. 238, 250; *Grisar* v. *McDowell,* 6 Wall. (73 U. S.) 363, 374; *Beard* v. *Federy,* 3 Wall. (70 U. S.) 478, 480; *United States* v. *Throckmorton,* 98 U. S. 61, 64. That this Court does not think adversaries were necessary is clear. In *Meader* v. *Norton,* 11 Wall. 442, 451–52, the Court said:

> Applicants for such confirmations were required to present their claims to the commissioners when sitting as a board, but the act of Congress made no provision for notice to any adverse claimant, and the proceedings before the commissioners were wholly ex parte unless opposed by the district attorney.

And in *United States* v. *Fossatt, supra,* the Court said (pp. 450–451):

> The United States did not appear in the courts as a contentious litigant; but as a great nation, acknowledging their obligation to recognize as valid every authentic title, and soliciting exact information to direct

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tion there that a constitutional court is the proper tribunal to decide a constitutional question does not apply here where the problem is the administrative determination of political obligations. There is nothing in the present Act to indicate that the court should reach a different result from that in *Keller* v. *Potomac Elec. Co.; Radio Comm.* v. *General Electric Co.; Postum Cereal Co.* v. *California Fig Nut Co.; Ex Parte Bakelite Corp.*, cited in the text.

their executive Government to comply with that obligation.

For other decisions approving the determination of private land claims without adversary proceedings, see instances where statutes provided simply for a final determination of claims by Congress subsequent to administrative investigations and reports, by a special commission (*Henderson* v. *Poindexter,* 12 Wheat. 530) or by a surveyor general (*Tameling* v. *U. S. Freehold, Etc., Co.,* 93 U. S. 644, 662).

It would seem clear, therefore, that so far as the proceedings before the Board are concerned no adversaries are necessary to support the validity of its decrees. Indeed, in many of its proceedings there was a mere nominal appearance by the agents of the United States, who decided to offer no testimony or argument in behalf of the Government. The determination of the merits in such instances was left to the Board with only the petitions and proofs of the claimants before it. Yet the Board rejected some claims even under these circumstances.[27]

c. *The decree of the District Court.*—So far as the decree of the District Court in *Bissell and Aspinwall* v. *United States* is concerned, it is submitted that the decree is not now subject to collateral attack by respondents here on the ground that

[27] Mss. Transcripts of Proceedings in Land Cases before the Board of Commissioners in California, 1852–1856, The National Archives.

the court had no jurisdiction in the *Bissell and Aspinwall* case. There is authority for the proposition that the court does not lose jurisdiction, so that its decree is subject to collateral attack, merely because at a stage of the proceedings the claim of one adversary has been purchased by his opponent. *Schmertz Wire Glass Co.* v. *Western Glass Co.*, 178 Fed. 977, 986–988 (C. C. N. D., Ill.), approved on appeal although affirmed on another ground, 185 Fed. 788 (C. C. A. 7); *Colman* v. *Hathaway*, 285 Fed. 602, 604 (D. Mass.).[28] Apart from this consideration, however, the Bissell and Aspinwall decree would not be without effect even if the proceedings before the District Court had in fact been non-adversary in character, for the following reasons:

1. The Mexican Claims Act established the Board and provided in Section 9 for review of its decisions by the District Court. Either the claimant or the United States, if dissatisfied with the rejection or confirmation of a Mexican claim, could "present a petition to the District Court * * * praying the said court to review the decision." It

[28] *Lord* v. *Veazie*, 8 How. 251, 256, and *Cleveland* v. *Chamberlain*, 1 Black 419, on which the court below bases its opinion, are not in conflict with petitioner's contention. Those cases did not involve the validity of a decree which the court had rendered, since the court did not proceed to a decree but adopted one of the other alternatives suggested in the *Schmertz* case cited in the text. Furthermore, these were cases of fraud upon the court. Here, as noted in the text (pp. 49–50) there was no concealment from the court.

is plain that a decision from which no review was sought was fully as conclusive as one which had been affirmed on review by the District Court or by the Supreme Court. Accordingly, even if the District Court were without jurisdiction because the parties were not true adversaries, the decree of the Board would stand unaffected by the fact that the decree of affirmance might be subject to collateral attack.

2. Moreover, even if the proceedings in the District Court were not between adversaries and even if it were necessary that the District Court have jurisdiction if the decree of the Board were to stand, the respondents cannot attack a decree which has settled property rights for a period of almost three-quarters of a century. For, they are barred by laches since they (and their grantor) stood by while the United States reclaimed and improved the property; and they are estopped since their grantor acquiesced in the taking of the lands. (*Supra*, pp. 58–65.)

As this Court, in affirming a judgment dismissing an action of ejectment, *Kirk* v. *Hamilton*, 102 U. S. 68, 78–79, said with reference to an attack upon prior judicial proceedings:

> The plaintiff is estopped from disturbing the possession of the defendants. He knew, as we have seen, that the defendants claimed the property under a sale made in an equity suit to which he was an original party. The sale may have been a nullity, and it may be that he could have repudiated it as a valid

> transfer of his right of property * * * Knowing that the defendants' claim to the premises rested upon that sale, he remained silent while the latter expended large sums in their improvement, and, in effect, disclaimed title in himself. He was silent when good faith required him to put the purchaser on guard. He should not now be heard to say that that is not true which his conduct unmistakably declared was true and upon the faith of which others acted.

The court quoted with approval (pp. 76–78) a statement by Chancellor Kent in *Wendell* v. *Van Rensselaer*, 1 Johns. (N. Y.) Ch. 344, 354, which exactly fits the instant case:

> There is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares, that if one man, knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his own claim, shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel.

Additional authorities to the same effect are set forth in the margin.[29]

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[29] *Simons* v. *Burlington &c. Railway Co.*, 159 U. S. 278, 291; *Abraham* v. *Ordway*, 158 U. S. 416, 420, 421; *Burrow* v. *Carley*, 210 Cal. 95; *Pacific Imp. Co.* v. *Carriger*, 136 Cal. xix, fully reported in 68 Pac. 315, 318–319; *Godeffroy* v.

Accordingly, it is submitted that the decree of the District Court in *Bissell and Aspinwall* v. *United States* is not now subject to attack for want of adversary parties.

(7) *The validity of the Castro grant cannot now be reexamined as an original matter.*

Respondents assert "that the Mexican grant under which it [the United States] asserts title is, in fact, fraudulent" (Br. in Opp. p. 7), and the court below sought to retry as an original matter the validity of the grant Castro claimed from Governor Alvarado (R. 973–981). However, the existence, the validity, and the extent of the Castro grant—as conveyed to Bissell and Aspinwall and by them to the United States—were "forever foreclosed" when those matters were determined by the Board and the District Court eighty years ago. *More* v. *Steinbach*, 127 U. S. 70, 82–83; *United States* v. *Workman*, 1 Wall. 745. As this Court said, through Mr. Justice Field, in *Beard* v. *Federy*, 70 U. S. 478, 492–493:

> If parties asserting interests in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correct-

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Caldwell, 2 Cal. 489, 492. An exhaustive annotation of cases to the same effect is set forth in 50 A. L. R. 672, 685, 878, 966, 967. See also Ann. Cas. 1913 C. 60; 39 L. R. A. (n. s.) 500; *Ewart*, Estoppel, pp. 88–92.

> ness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. The patentee would find his title recognized in one suit, and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests, or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rest would be open to contestation.

This Court has assiduously protected the property rights of those who base their title upon confirmed Mexican grants, and in every instance has repelled such forays as respondents attempt in the present case. Even the United States may not impugn such grants, for as the Court said in *United States* v. *Throckmorton*, 98 U. S. 61 (pp. 68–69):

> The mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases. * * *
>
> The genuineness and validity of the concession from Micheltorena produced by complainant was the single question pending before the board of commissioners and the

> District Court for four years. It was the thing, and the only thing, that was controverted, and it was essential to the decree. To overrule the demurrer to this bill would be to retry, twenty years after the decision of these tribunals, the very matter which they tried, on the ground of fraud in the document on which the decree was made. If we can do this now, some other court may be called on twenty years hence to retry the same matter on another allegation of fraudulent combination in this suit to defeat the ends of justice; and so the number of suits would be without limit and the litigation endless about the single question of the validity of this document.

See also *Thompson* v. *Los Angeles Farming & Milling Co.*, 180 U. S. 72.

The inequities and injustices which would result from departing from these decisions and at this late date requiring those claiming under a Mexican grant originating a century ago to prove the validity of the original conveyance are apparent. Through the long passage of years, grantors and contemporary witnesses have died, documentary evidence of every sort has been lost or destroyed, and those who would be required, under the theory of respondents, to establish again the validity of the title conveyed by their original grantor, would be wholly prevented from asserting their claims.

As this Court has frequently pointed out, in the cases cited *supra*, Congress has carefully guarded against any such eventuality by providing a pro-

cedure for conclusively establishing the validity of a Mexican grant for all time to come against the whole world. Indeed, this Court has held that even a perfect Mexican title, as distinguished from an inchoate one, even though genuine in all respects, may no longer be asserted in the courts of this country unless it was presented and confirmed under the Land Commission Act. *Botiller* v. *Dominquez,* 130 U. S. 238. In that case this Court established the principle (pp. 255–256):

> that no title to land in California, dependent upon Spanish or Mexican grants can be of any validity which has not been submitted to and confirmed by the board provided for that purpose in the act of 1851; or, if rejected by that board, confirmed by the District or Supreme Court of the United States.

The Court quoted (p. 252) from the opinion of Chief Justice Taney in *Fremont* v. *United States,* 17 How. 542, 553, wherein it was said:

> It will be seen from the quotation we have made, that the 8th section embraces not only inchoate or equitable titles, but legal titles also; and requires them all to undergo examination and to be passed upon by the court. The object of this provision appears to be, to place the titles to land in California upon a stable foundation, and to give the parties who possess them an opportunity of placing them on the records of the country, in a manner and form that will prevent future controversy.

It is therefore submitted that the existence, validity, or extent of the Mexican grant under which petitioner has acquired title present questions that are wholly irrelevant to the determination of the instant case, and respondents may take no comfort from the dicta in *Bouldin* v. *Phelps,* 30 Fed. 547, in which the grant from Governor Alvarado to Castro is said to be fraudulent. Petitioner was not a party to that case, which was brought solely against the naval officers in possession of Mare Island. The validity of the Government's title to Mare Island was not involved, for it is a familiar principle that in ejectment the plaintiff must recover upon the strength of his own title and not upon any weakness in the defendant's. In no sense, then, is *Bouldin* v. *Phelps* res adjudicata as to the present case, and the accusation by the court below, charging the United States with a "purposeful shift of position" (R. 978), is without justification. In the *Bouldin* case, as in the *Bissell and Aspinwall* case, the Government urged that the Castro grant was fraudulent. Having purchased the rights of Bissell and Aspinwall, the Government is entitled to rest on the decree in that case without being charged with improper conduct.

Accordingly, it is submitted as conclusively established by the repeated and express rulings of this Court that the validity of the Castro grant cannot be examined now as an original matter.

III

THE SWAMP ACT DID NOT GRANT TO CALIFORNIA ANY TITLE TO LANDS CLAIMED, WHEN THE ACT WAS PASSED, UNDER A MEXICAN GRANT

Wholly aside from the foregoing principal questions of adverse possession or the conclusiveness of the decrees, it is the position of the Government that the Swamp Act did not grant to California any title to the lands here in question because that Act applied only to lands which, at the time it was passed, were public lands; that California lands as to which there were Mexican claims outstanding (such as the Castro claim) were not public lands but were reserved and excepted from disposal by the United States; and that, hence, respondents' asserted source of title, the Swamp Act, passed no interest to California or California's grantees.

Swamp Act operative only in praesenti.—In a line of decisions and in a variety of circumstances this Court has steadily held that the Swamp Act was a grant to the states *in praesenti;* that is, effective only unconditionally and at the time of the approval of the act, September 28, 1850. This position was aptly summarized by Mr. Justice Van Devanter speaking for this Court in *United States* v. *Minnesota,* 270 U. S. 181, 202–203, as follows:

> By the act of September 28, 1850, Congress granted to the several States the whole of the swamp lands therein then remaining unsold, c. 84, 9 Stat. 519. The first section

> was in the usual terms of a grant *in praesenti*, its words being that the lands described "shall be, and the same are hereby, granted." The second section charged the Secretary of the Interior with the duty of making out and transmitting to the governor of the State accurate lists and plats of the lands described, and of causing patents to issue at the governor's request; and it then declared that on the issue of the patent the fee simple to the lands should vest in the State. * * * The question soon arose whether, in view of the terms of the first and second sections, the grant was *in praesenti* and took effect on the date of the Act, or rested in promise until the issue of the patent and took effect then. The then Secretary of the Interior, Mr. Stuart, concluded that the grant was *in praesenti* in the sense that the State became immediately invested with an inchoate title which would become perfect, as of the date of the Act, when the land was identified and the patent issued, 1 Lester's Land Laws, 549. That conclusion was accepted by his successors, was approved by the Attorney General, 9 Op. 253, was adopted by the courts of last resort in the States affected, and was sustained by this Court in many cases.

It is not anticipated that this rule, with which the court below is in accord (R. 1009), will be controverted. Indeed, since the land here in controversy was reserved for naval purposes by presidential orders in November 1850, (R. 328–329) and again

in 1853 (R. 381), long prior to the issuance of any patent for the lands under the Swamp Act, the title of the United States would be clear if that Act were not a grant *in praesenti*.

The general principle respecting grants *in praesenti* has been rigidly applied so that such grants could not be made operative either to confer swamp lands upon states admitted to the union after the date of the Swamp Act (*Rice* v. *Sioux City & St. Paul R. R. Co.*, 110 U. S. 695) or to apply to other types of lands which became part of the public domain after the date of the granting act. Lands which revert to or become a part of the public domain after the passage of the granting act and before the performance of conditions precedent by the grantee, such as the identification or survey of the lands or the location or partial completion of a line of railroad where railroad grants are involved, do not pass. Thus, lands subject to use and occupancy by an Indian tribe have been held exempt from the operation of a railroad land grant, even though subsequently an Indian tribe by treaty relinquishes its right to lands and removes therefrom before the railroad has become entitled to select its granted lands. *Leavenworth Etc. R. R. Co.* v. *United States*, 92 U. S. 733, 749.

In *Leavenworth, Etc., R. R. Co.* v. *United States, supra,* this Court stated the rule as to grants *in praesenti* and the reasons for it as follows (741–742):

> these grants have always been recognized as attaching only to so much of the public domain as was subject to sale or other disposal * * *.
>
> Such grants could not be otherwise construed; for Congress cannot be supposed to have thereby intended to include land previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of it was not necessary; because the policy which dictated them confined them to land which Congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts * * *.

The rule and the reasons have been found by this Court to be applicable to lands claimed under Mexican grants in California.

Lands subject to Spanish or Mexican claims.— The same rule has been applied to lands subject to Spanish or Mexican claims (such as the claim here involved) at the time of grants *in praesenti* to railroads, even though the claims were later rejected so that the lands became a part of the public domain. Thus, in *Newhall* v. *Sanger,* 92 U. S. 761, 763–765, this Court denied the application of a railroad grant, as to California lands subject to Mexi-

can claims later rejected under the Mexican Claims Act as invalid. There the Court said (763–765):

> It was not until March 3, 1851, that our government created a commission to receive, examine, and determine them. As the operations of our land system, had it then been extended to California, would have produced the utmost confusion in titles to real estate within her limits, it was wisely withheld by Congress, until such claims should be disposed of. The act of that date declared that all lands, the claims to which should not have been presented within two years therefrom, should "be deemed, held, and considered to be a part of the public domain of the United States." This was notice to all the world that lands in California were held in reserve to afford a reasonable time to the claimant under an asserted Mexican or Spanish grant to maintain his rights before the commission. * * *
>
> Claims, whether grounded upon an inchoate or a perfected title, were to be ascertained and adequately protected. This duty, enjoined by a sense of natural justice and by treaty obligations, could only be discharged by prohibiting intrusion upon the claimed lands until an opportunity was afforded the parties in interest for a judicial hearing and determination. It was to be expected that unfounded and fraudulent claims would be presented for confirmation. There was, in the opinion of Congress, no mode of separating them from those which were valid without investigation by a com-

> petent tribunal; and our legislation was so shaped that no title could be initiated under the laws of the United States to lands covered by a Spanish or Mexican claim, until it was barred by lapse of time or rejected.

The opinion is quite clear that (1) lands claimed under a Mexican grant were, even prior to the Mexican Claims Act, reserved from disposal by the United States as public lands; (2) Section 13 of the Mexican Claims Act recognized this principle in providing a two-year period within which claims should be presented to the Board and providing that claims not so presented or rejected by the Board should become a part of the public lands; and (3) the reason for this principle was that the duty of the United States to Mexican claimants could not fairly be discharged except "by prohibiting intrusion upon the claimed lands until an opportunity was afforded" for a determination of their claims.

In *United States* v. *McLaughlin*, 127 U. S. 428, 449, 451, this Court applied the general rule to California lands subject to a Mexican claim, despite the fact that, subsequent to the date of the railroad grant involved, the Mexican claim had been found to be "a wretched fraud":

> We can well understand that Indian reservations and reservations for military and other public purposes of the government should be considered as absolutely reserved and withdrawn from that portion of the public lands which are disposable to purchasers

> and settlers—for, in those cases, the use to which they are devoted, and for which they are deemed to be reserved, extends to every foot of the reservation. The same reason applies to Mexican grants of specific tracts, such as a grant for all the land within certain definite boundaries named, or all the land comprised in a certain rancho or estate.

The Court also (p. 454, 455) reaffirmed the reasoning in *Newhall* v. *Sanger* as "entirely conclusive," and restated that decision as follows:

> The lands comprised in a Mexican grant, it was held, must be regarded not as "public lands" but as "reserved" lands, because, by the treaty with Mexico, all private property was to be respected. And when the Act of March 3d, 1851, created a board of commissioners to examine all claims to Mexican grants, the 13th section declared "that all lands the claims to which have been finally rejected by the commissioners in the manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the commissioners within two years after the date of this act, shall be deemed, held, and considered, as part of the public domain of the United States," 9 Stat. 633; implying that until then they were not part of the public domain.

See to the same effect *Doolan* v. *Carr*, 125 U. S. 618. The rule of these decisions was applied to the Swamp Lands Act by the Supreme Court of Cali-

fornia in *Shanklin* v. *McNamara,* 87 Cal. 371. There the state court held that lands claimed under a Mexican grant were impliedly excepted from the grant of swamp lands to the state, despite the fact that the claim as finally confirmed excluded the lands.

In the latter case, the Supreme Court of California pointed out that (p. 383):

> It cannot be presumed that Congress would have granted directly and unconditionally to a person a tract of land of which the United States did not have the absolute and uncontrolled title, so that its grantee might at once take possession.

Certainly an unconditional grant *in praesenti,* as the Swamp Lands Act was, presupposes that the United States has full title and that its grantee can immediately take possession, or can at least proceed to perfect his title. But even assuming that the grant to Castro was invalid, or even fraudulent, his claim could only be extinguished by a final adjudication of the Board of Land Commissioners, in a proceeding to which the grantee of the United States would not be a party and over which it would have no control. Until this proceeding was terminated, the land could not properly be said to be a part of the public domain intended to be subject to disposal by the United States.

It may be noted that the bare existence of the decision in *Shankin* v. *McNamara,* not mentioned

by the court below, is a complete and eloquent answer to the assertion of that court (R. 1009) that California land titles would be seriously unsettled by a holding that the Swamp Lands Act did not apply to lands claimed under Mexican grants.

Floating grants an immaterial exception to the rule of Newhall v. *Sanger.*—The earlier cases held that all lands within a Mexican claim of any sort were impliedly exempted from grants by the United States. *Newhall* v. *Sanger, supra; Van Reynegan* v. *Bolton,* 95 U. S. 33; *Shanklin* v. *McNamara, supra.* Later cases, however, found it necessary to draw a distinction between grants which definitely identified the land granted and so-called "floating grants"—that is, grants of a given area within a much larger area. It became evident that, if the rule of *Newhall* v. *Sanger* were applied to all the land within the boundaries of floating grants, immense tracts would be excepted from the operation of the land laws. A "floating" grant, therefore, came to be treated as a promise to make a grant within the stated boundaries,[20] and a grant

[20] "Mexican grants were of three kinds: (1) grants by specific boundaries, where the donee is entitled to the entire tract, whether it be more or less; (2) grants of quantity, as of one or more leagues within a larger tract described by what are called outside boundaries, where the donee is entitled to the quantity specified, and no more; (3) grants of a certain place or rancho by name, where the donee is entitled to the whole tract according to the boundaries given, or if not given, according to its extent as shown by previous possession. *Higueras* v. *United States,* 5 Wall. 827, 834. In the first and third kinds, the claim of the grantee extends to

by the United States was held to apply to land within the boundaries of a floating grant, so long as a sufficient quantity of land remained ungranted within those boundaries to satisfy the rights of the Mexican grantees. *Doolan* v. *Carr,* 125 U. S. 618, 632; *United States* v. *McLaughlin,* 127 U. S. 428, 448–457; *Carr* v. *Quigley,* 149 U. S. 652, 657–662. The rule of *Newhall* v. *Sanger* remained in force as to grants which definitely identified the land granted. *United States* v. *McLaughlin, supra,* p. 455.

However, it is clear that the grant to Castro was not a "floating" grant. It was for "the Island named 'La Yegu' * * * in all its extent * * *" (R. 250–251.) "La Yegu" was the Spanish name for Mare Island. The distinction with respect to floating grants is stated here merely to facilitate an understanding of the language of the cases.

Decisions on Mexican claims to lands in New Mexico not controlling.—As authority for its decision that lands subject to Mexican claims, subsequently shown to be invalid, were not reserved

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the full limits of the boundaries designated in the grant or defined by occupation; but in the second kind, a grant of quantity only, within a larger tract, the grant is really a float, to be located by the consent of the government before it can attach to any specific land, like the land warrants of the United States * * * It is the option of the government, not of the grantee, to locate the quantity granted; * * *" (*United States* v. *McLaughlin,* 127 U. S. 428, 448, 449.)

from the operation of the Swamp Act, the court below relied upon *Lockhart* v. *Johnson*, 181 U. S. 516, and *Lane* v. *Watts*, 235 U. S. 17, decisions dealing with Mexican claims to lands in New Mexico.

A summary of the legislation with respect to Mexican claims to land in New Mexico, upon which these two cases depend, will facilitate an understanding of them. The Act of July 22, 1854, 10 Stat. 308, created the office of Surveyor General of the Territory of New Mexico and Section 8 of that Act directed that official to investigate all Mexican claims to land in New Mexico and to make a report of such claims, together with his decision as to their validity, to Congress, which would confirm or reject them. Section 8 further provided that "until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government." In 1891, Section 8 was specifically repealed by 26 Stat. 854, Sec. 15. The latter Act established the Court of Private Land Claims for the litigation of Mexican claims to lands in New Mexico, and Section 14 provided that, if it should appear in any suit in the Court of Private Land Claims that land decreed to a claimant under a Mexican grant meanwhile had been granted by the United States to any other person, the title from the United States should remain valid, but the Court should render a money judgment in favor of the Mexican claimant and against the United States for the value of the land.

Two major differences between this legislation and that for California will be noticed. In the first place, the legislation for New Mexico contained no requirement that Mexican claims be presented within any period of time. In the second place, the Act of 1891 not only repudiated for New Mexico the rule of *Newhall* v. *Sanger,* but went so far as to validate grants of lands by the United States which were void when made because within even a *valid* Mexican claim.

Lockhart v. *Johnson,* 181 U. S. 516, dealt with a location made under the mining laws upon land which was, at the time of the location, claimed under a Mexican grant subsequently held not to include the land. The location was made after the enactment of the Act of 1891, and the court held the location was not invalid by reason of the existence of the Mexican grant because Section 8 of the Act of 1854 had been repealed. The court went on to say that the principle embodied in Section 8 did not exist apart from statute.

The question in *Lane* v. *Watts,* 235 U. S. 17, was whether a floating grant by the United States itself "to vacant land, not mineral, in the Territory of New Mexico" included lands as to which there existed, at the time of the grant, Mexican claims which had not then been disclosed or presented to the Surveyor General (and which, on subsequent presentation, were rejected in part). The court said that Section 8 of the Act of 1854 had been repealed, that the rule expressed in that section did

not exist apart from statute, and that in any event Section 8 did not reserve lands claimed under a Mexican claim from disposal by the United States until the claim had been presented to the Surveyor General.

These decisions are not at variance with the position of the Government herein. In *Newhall* v. *Sanger* this Court held that lands claimed under Mexican claims were not included in grants of public lands by the United States. This rule, the Court said, was necessary to do justice to the Mexican claimants. Indeed, it said that the duty of the United States to those claimants "could only be discharged by prohibiting intrusion upon the claimed lands until an opportunity was afforded" for determination of their claims (92 U. S., at 764). It pointed out that the principle had been recognized by Congress in Section 13 of the Mexican Claims Act and in the Act of March 3, 1853, 10 Stat. 226, introducing the public land system into California. To the same effect, see *United States* v. *McLaughlin*, 127 U. S. 428, 454, 455.

This canon of interpretation could, of course, whatever its origin, be changed by Congress. And Congress did change it for New Mexico. The Act of 1854 did not require Mexican claims to lands in New Mexico to be presented within any definite time. In view of that fact, it would have been un-

reasonable to regard Mexican claims, unrevealed and unpresented, as withholding lands from the category of public lands. Moreover, Section 8 of the Act of 1854, unlike Section 13 of the Mexican Claims Act, was susceptible of the interpretation that lands claimed under asserted Mexican grants were withdrawn from the category of public lands only when the Mexican claim was presented, and not before. That interpretation was adopted by this Court in *Lane* v. *Watts*. Then Congress, by the Act of 1891, expressly repealed Section 8 and thereby wholly abrogated even the limited application which Section 8 had allowed the principle of construction adopted for California in *Newhall* v. *Sanger*. Indeed, Congress went so far as to validate grants by the United States of land within even *valid* Mexican claims, providing, in lieu of the lands, monetary compensation for the Mexican grantees.

But Congress has never altered the principle of construction adopted in *Newhall* v. *Sanger* for California. It recognized it in 1851 and again in 1853 and neither act has been repealed. It may be admitted that, on the question whether that construction was proper independently of statute, the language of the decisions is conflicting. *Newhall* v. *Sanger* and *United States* v. *McLaughlin* dealing with California said that it was. *Lockhart* v. *Johnson* and *Lane* v. *Watts*, dealing with *New* Mexico, said that it was not. It is submitted that *Newhall* v. *Sanger* and *United States* v. *Mc-*

Laughlin state the correct principle with respect to California and that the Court below herein has fallen into error in applying the New Mexico rule to California.

CONCLUSION

It is of great importance, both to the United States and to California land owners generally, that the attack upon the validity of decrees rendered pursuant to the Mexican Claims Act be rejected. The decision below at least contains the seeds of uncertainty with respect to California land titles. Eighty-six years ago Congress set up the Board of Land Commissioners to pass upon the validity of land held or claimed under Mexican grants. This Court has frequently held that a determination by the Commissioners was conclusive against the United States, California, or anyone claiming under either of them. Now, the Circuit Court of Appeals declares that at least in some ill-defined circumstances the decisions of the Land Commissioners are not conclusive against California or persons claiming under it. If this decision stands, holders of title unquestioned for generations are threatened with harassment and possible eviction.

More particularly, so far as the United States is concerned, the lands involved are important. The United States has been in undisturbed possession for seventy-three years. It has expended two million dollars developing the lands here involved as

an integral part of the Mare Island naval base (R. 1009), and we are informed that expenditures on other parts of the island exceed forty million dollars.

It is respectfully submitted that the judgment be reversed and the cause be remanded to the court below with directions to affirm the judgment of the trial court.

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APPENDIX

Act of September 28, 1850, c. 84, 9 Stat. 519:

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.

SEC. 2. *And be it further enacted,* That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however,* That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

SEC. 3. *And be it further enacted,* That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation,"

shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

SEC. 4. *And be it further enacted,* That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known as designated as aforesaid, may be situated.

Approved, September 28, 1850.

Act of March 3, 1851, c. 41, 9 Stat. 631:

Chap. XLI. An Act to ascertain and settle the private Land Claims in the State of California.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of ascertaining and settling private land claims in the State of California, a commission shall be, and is hereby, constituted, which shall consist of three commissioners, to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States.

SEC. 2. *And be it further enacted,* That a secretary, skilled in the Spanish and English languages, shall be appointed by the said commissioners, whose duty it shall be to act as interpreter, and to keep a record of the proceedings of the board in a bound book, to be filed in the office of the Secretary of the Interior on the termination of the commission.

SEC. 3. *And be it further enacted,* That such clerks, not to exceed five in number, as

may be necessary, shall be appointed by the said commissioners.

SEC. 4. *And be it further enacted,* That it shall be lawful for the President of the United States to appoint an agent learned in the law, and skilled in the Spanish and English languages, whose special duty it shall be to superintend the interests of the United States in the premises, to continue him in such agency as long as the public interest may, in the judgment of the President, require his continuance, and to allow him such compensation as the President shall deem reasonable. It shall be the duty of the said agent to attend the meetings of the board, to collect testimony in behalf of the United States, and to attend on all occasions when the claimant, in any case before the board, shall take depositions; and no deposition taken by or in behalf of any such claimant shall be read in evidence in any case, whether before the commissioners, or before the District or Supreme Court of the United States, unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the district attorney of the proper district, so long before the time of taking the deposition as to enable him to be present at the time and place of taking the same, and like notice shall be given of the time and place of taking any deposition on the part of the United States.

SEC. 5. *And be it further enacted,* That the said commissioners shall hold their sessions at such times and places as the President of the United States shall direct, of which they shall give due and public notice; and the marshal of the district in which the board is sitting shall appoint a deputy, whose duty it shall be to attend upon the

said board, and who shall receive the same compensation as is allowed to the marshal for his attendance upon the District Court.

SEC. 6. *And be it further enacted,* That the said commissioners, when sitting as a board, and each commissioner at his chambers, shall be, and are, and is hereby, authorized to administer oaths, and to examine witnesses in any case pending before the commissioners, that all such testimony shall be taken in writing, and shall be recorded and preserved in bound books to be provided for that purpose.

SEC. 7. *And be it further enacted,* That the secretary of the board shall be, and he is hereby, authorized and required, on the application of the law agent or district attorney of the United States, or of any claimant or his counsel, to issue writs of subpoena commanding the attendance of a witness or witnesses before the said board or any commissioner.

SEC. 8. *And be it further enacted,* That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the

district in which such decision shall be rendered.

SEC. 9. *And be it further enacted,* That in all cases of the rejection or confirmation of any claim by the board of commissioners, it shall and may be lawful for the claimant or the district attorney, in behalf of the United States, to present a petition to the District Court of the district in which the land claimed is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim; and such petition, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present claimants, and shall contain a deraignment of the claimant's title, together with a transcript of the report of the board of commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, a copy of which petition, if the same shall be presented by a claimant, shall be served on the district attorney of the United States, and, if presented in behalf of the United States, shall be served on the claimant or his attorney; and the party upon whom such service shall be made shall be bound to answer the same within a time to be prescribed by the judge of the District Court; and the answer of the claimant to such petition shall set forth fully the nature of the claim, and the names of the

original and present claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, copies of which answers shall be served upon the adverse party thirty days before the meeting of the court, and thereupon, at the first term of the court thereafter, the said case shall stand for trial, unless, on cause shown, the same shall be continued by the court.

SEC. 10. *And be it further enacted,* That the District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court, and shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States, on such security for costs in the District and Supreme Court, in case the judgment of the District Court shall be affirmed, as the said court shall prescribe; and if the court shall be satisfied that the party desiring to appeal is unable to give such security, the appeal may be allowed without security.

SEC. 11. *And be it further enacted,* That the commissioners herein-provided for, and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

SEC. 12. *And be it further enacted,* That to entitle either party to a review of the proceedings and decision of the commissioners hereinbefore provided for, notice of the intention of such party to file a petition to the District Court shall be entered on the journal or record of proceedings of the commissioners within sixty days after their decision on the claim has been made and notified to the parties, and such petition shall be filed in the District Court within six months after such decision has been rendered.

SEC. 13. *And be it further enacted,* That all lands the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims the said surveyor-general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act "to create the office of surveyor of the public

lands for the State of Louisiana," approved third March, one thousand eight hundred and thirty-one: *Provided always,* That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same. *And provided, further,* That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the commissioner of the general land office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

SEC. 14. *And be it further enacted,* That the provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town or village existed on the seventh day of July, eighteen hundred and forty-six; but the claim for the

same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town, or village was originally granted to an individual, the claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town, or village on the said seventh July, eighteen hundred and forty-six, being duly proved, shall be prima facie evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town, or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town or village.

SEC. 15. *And be it further enacted*, That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

SEC. 16. *And be it further enacted*, That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.

SEC. 17. *And be it further enacted*, That each commissioner appointed under this act shall be allowed and paid at the rate of six thousand dollars per annum; that the secretary of the commissioners shall be allowed and paid at the rate of four thousand dol-

lars per annum; and the clerks herein provided for shall be allowed and paid at the rate of one thousand five hundred dollars per annum; the aforesaid salaries to commence from the day of the notification by the commissioners of the first meeting of the board.

SEC. 18. *And be it further enacted,* That the secretary of the board shall receive no fee except for furnishing certified copies of any paper or record, and for issuing writs of subpoena. For furnishing certified copies of any paper or record, he shall receive twenty cents for every hundred words, and for issuing writs of subpoena, fifty cents for each witness; which fees shall be equally divided between the said secretary and the assistant clerk.

Approved, March 3, 1851.

California Statutes, 1854–1855, pp. 48–49, Chapter XLIII (Passed May 11, 1854):

AN ACT declaring the Consent of the Legislature of the State of California to the Purchase by the United States of Signor, or Mare Island; to relinquish the Title and Interest of the State in overflowed portions of said Island, and to vest the Jurisdiction over the same in the United States, for the purposes therein specified. [Passed May 11, 1854.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. The consent of the State of California is hereby given to the purchase by the United States of a certain tract or parcel of land situated in the county of Solano, known as Signor or Mare Island, for the purpose of erecting and maintaining thereon such arsenals, magazines, docks,

dock-yards, and other military and naval structures as may be required for the use of the Government of the United States.

SECTION 2. The title and interest of the State of California to, and in such portions of the Island described in the preceding section as are overflowed beach, or swamp lands, on the eastern shore of the said Island, from the southern point thereof to a parallel intersecting the northern point of the highlands, and extending into the waters of the bay or straits, washing the eastern shore of said highlands of the Island to ship channel, is hereby relinquished and granted to the United States for the purposes specified in the preceding section; and the jurisdiction of such part of said Island, and the overflowed portions of the eastern shore thereof as are south of a parallel intersecting the northern point of the highlands, is hereby ceded by the State of California to the United States for the purposes aforesaid: *Provided*, That the consent to the purchase, and the grant and relinquishment of title, by this State to the United States, in this Act contained, shall not be construed in aid or support, directly or impliedly, of any conveyance or bond for title to the United States of the same lands heretofore made, or which may hereafter be made, by any person or persons, company or corporations, or as a recognition on the part of the State of California of any claim, title or grant heretofore asserted or set up, or which may hereafter be asserted or set up by any person or persons, company or corporation.

SECTION 3. The jurisdiction ceded to the United States in the last preceding section is upon the express condition that the State of California shall retain a concurrent juris-

diction with the United States in and over the said tract of land, so far as that civil process in all cases, and such criminal process as may issue under the authority of the State of California, against any person or persons charged with crime committed within or without said tracts of land, may be executed therein in the same way and manner as if this jurisdiction had not been ceded, except so far as such process may affect any of the real or personal property of the United States within the said tract of land, and all the lands and tenements within the limits aforesaid shall be, and continue forever hereafter, exonerated and discharged from all taxes, assessments, and other charges which may be imposed by authority of this State.

SECTION 4. The relinquishment made, the jurisdiction ceded, and the exemption from taxation granted by this Act, shall continue so long as the premises herein specified shall remain in the occupancy of the above United States of America, for the purposes mentioned in the first section of this Act, and no longer.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 487

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES E. O'DONNELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

CHRONOLOGICAL OUTLINE OF EVENTS

Respondents in their brief (pp. 31–45) raise and give principal emphasis to a boundary question which was decided against them in both courts below and was not treated in the brief for the United States. The facts of the case are complicated; the record is voluminous and confusing. Proper understanding, particularly in regard to the boundary question, requires an outline of the principal events in the long history of this land claim. These salient facts, grouped and arranged as nearly chronologi-

cally as may be, are set forth for the convenience of the Court as follows:

1. *1841: Castro Grant.*—Aside from adverse possession (Brief for the United States, 18–30, and *infra*), the United States asserts title as the successor of Victor Castro who claimed Mare Island by grant on May 20, 1841, from Alvarado, the "regular constitutional governor of the department of the Californias." The grant, which the successors of Castro produced, is set forth at R. 19 (Exhibit A, to Complaint) and 250–251 (transcript of record before Board of Land Commissioners). It was offered and received in evidence as recorded in Spanish, together with a translation (R. 301, 479–480; see Pl. Ex. D, original). The original presumably was destroyed in the earthquake and fire of 1906, since the Mexican archives were kept in the San Francisco office of the Surveyor General of the United States for California where all but a few were destroyed in the fire (R. 213). Counsel stipulated the succession of the United States to "any right, title, or interest that Victor Castro had" (R. 214, 216).

2. *1846–1848: War with Mexico and recognition of native property rights.*—(For materials on guarantee of property rights, see Brief for the United States, p. 5.)

3. *1850: Report of "Smith" board and first executive reservation.*—On March 31, 1850, a board of naval officers, under Commander Smith, recom-

mended to the Secretaries of War and Navy that lands on both sides of Mare Island Straits be reserved for public purposes (R. 331–336). Accordingly, on November 6, 1850, President Fillmore so reserved the lands, including "Mare Island" (R. 327–329).

4. *1850: Admission of California and passage of Swamp Act.*—California was admitted to the Union on September 9, 1850. Nineteen days later, on September 28, 1850, the President approved an act granting to the states "the whole of those swamp and overflowed lands" of the public domain within their borders. 9 Stat. 519. It may be admitted that the lands here in controversy (with the exception of a "sand ridge" or barrier of dunes thereon) were marsh lands at that time and subsequently, as shown by the surveys hereafter noted.

5. *1851: Mexican Claims Act.*—On March 3, 1851, the President approved an act to carry out the treaty pledge regarding property rights of natives. All persons claiming under Mexican or Spanish grants in California were permitted to seek confirmation of their claims before a commission composed of three members; and an "agent" was provided to "superintend the interests of the United States." Claimants or the Government could petition for review in the district courts and in the Supreme Court. 9 Stat. 631. (See Brief for the United States, 5–6.)

6. *1852: Proceedings before the Board of Land Commissioners and District Court.*—On August 31,

1852, George W. Bissell and William H. Aspinwall, as successors of Victor Castro (R. 251–276, 291–295), filed their petition with the Board of Land Commissioners for the confirmance of the Mexican grant (R. 220). They submitted a document purporting to be the grant from Alvarado to Castro, in addition to an earlier permit "to occupy with horses the Island" (R. 248–251).

The claimants produced Alvarado, former governor, who stated, by deposition of October 10, 1854, that he had made the grant at the time and place represented on the document (R. 226–237); M. G. Vallejo, who testified, by deposition of October 19, 1854, that Castro had occupied the Island since 1840 and that he, Vallejo, had seen Castro's title papers "some twelve years ago," which he identified as the documents presented to the Land Commissioners (R. 237–239); and J. J. Castro, a brother, who, by deposition of October 19, 1854, also testified to the occupation of the Island by Victor Castro since 1840 (R. 239–243). The United States produced Stephen Cooper who, by deposition of April 20, 1854, testified that he had seen the grant sometime in 1850 at which time he thought the grant (as distinguished from the license for occupation) had been forged by someone because the writing comprising the grant "was not there in the winter of 1847 and 1848," but he did not know whether he had "noticed the difference by ocular inspection or whether it was hear-

say" (R. 222–225); William McDaniel who, by deposition of November 1, 1854, also testified that he had seen the document in 1850, at which time it was merely a paper permitting the use of the Island as pasture, but that sometime later in the same year he heard from Stephen Cooper that the latter had seen the paper with the grant written on it (R. 244–245); and L. B. Mizner who, by deposition of November 4, 1854, also testified that he had seen the document in 1850 and had noted that "on the first page" there was a "permit to pasture horses on the Island," but he was unable to say what the paper contained on its back though his "impression" was that the grant was not anywhere on the paper when he examined it (R. 245–247).

In May 1855, the Land Commissioners gave their opinion, stating that "strong suspicion has been raised" as to the time the alleged grant "was made and executed." However, the Board felt that the "negative" testimony of the Government did not warrant it "in discrediting entirely the testimony of Governor Alvarado" (R. 277–279). On May 8, 1855, the decree of confirmation of the grant by the Board was filed (R. 279–280, also 704). Transcripts of the proceedings were transmitted to the district court and the Attorney General of the United States (R. 280–282).

On February 18, 1856, the United States petitioned the district court that the decision of the Board be reversed (which was done "in every

case" as a matter of course, 7 Op. A. G. 672 at 675), and the plaintiffs filed a petition asking the affirmance of the decision (R. 283–284). On March 2, 1857, the district court made an order directing the entry of the decree of confirmation (R. 290), but the actual decree, although prepared, was not signed by the judge or entered (R. 285–286). On April 1, 1857, an appeal to the Supreme Court was sought by the Government (as was customary pending a determination by the Attorney General whether to prosecute appeals, 7 Op. A. G. 672–676, 8 Op. A. G. 515–517) and allowed but was later vacated (R. 286–288) along with the dismissal of appeals in 434 other cases (8 Op. A. G. 515 at 516).[1] On April 15, 1930, at the request of the Government, a decree was signed and entered *nunc pro tunc* as of March 2, 1857 (R. 20, 289–291).

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[1] In this connection it is significant that Attorney General Cushing had a perfect record of defeats in the Supreme Court of the United States in all California land cases appealed by the Government. *United States* v. *Ritchie*, 17 How. 524 (1854); *Fremont* v. *United States*, 17 How. 542 (1854); 18 How. 30 (1855); *Arguello* v. *United States*, 18 How. 539 (1855); *United States* v. *Reading*, 18 How. 1 (1855); *United States* v. *Cruz Cervantes*, 18 How. 553 (1855); *United States* v. *Vaca*, 18 How. 556 (1855); *United States* v. *Larkin*, 18 How. 557 (1855); *United States* v. *Peralta*, 19 How. 343 (1856); *United States* v. *Sutherland*, 19 How. 363 (1856). It was not until later, as respondents point out (Resp. br., 57), that sensational disclosures of fraud on the part of Mexican claimants changed the course of decision. This change, broadly speaking, explains the treatment of the Castro grant as fraudulent in *Bouldin* v. *Phelps*, hereafter discussed in the text.

7. *1852: The "Sloat" Board report.*—On November 6, 1852, a board of naval officers under Senior Officer J. D. Sloat "appointed to examine the shores and waters of the Bay of San Francisco in California, for the purpose of selecting a site for a Navy Yard and Depot" (R. 337), submitted a report pointing out the great need for a naval station (R. 340) and recommending Mare Island as the most favorable site (R. 351–357). On December 13, 1852, the Secretary of the Navy requested the board to give its estimate of the value of the Island; their reply, dated from Washington on the same day, estimated its value "for the contemplated uses of the United States at one hundred thousand dollars" (R. 324–325).

8. *1852: Purchase by United States.*—The Sloat Board had negotiated with Bissell and the other claimants for the purchase of the Island, but had reached no agreement and had referred the matter of a purchase to the Secretary of the Navy (R. 367–374). On December 15, 1852, the claimants agreed to sell the Island to the United States (R. 312–316, see also 316–323). A deed was executed on January 4, 1853 (R. 295–299, same 22–26, 302–306). On February 28, 1853, the vendors executed a bond in favor of the United States conditioned upon their undertaking to "at all times hereafter indemnify and save harmless the United States against any claim or title to the said tract called Mare Island and its appurtenances" and to "indemnify and

save harmless the United States against any adverse claim or title in any other person or persons or body politic which may within two years from the date hereof, be made and thereafter successfully established against the title proposed to be conveyed * * * by which the full and perfect title of the United States * * * may be in any wise impaired, diminished, or destroyed * * *" (R. 308–312).

9. *1853: Second reservation of site by President.*—On February 9, 1853, the Secretary of the Navy wrote the President, indicating the selection of the Island as the site for the navy yard and requesting that it "be reserved to the United States." On February 11, 1853, the President made the reservation as recommended (R. 379–381, same 28–30, 726–727), which was thereafter recorded (R. 382–383, 724–726, 728–729, 729–731).

10. *1854: California's consent to the purchase.*—On May 11, 1854, California by statute gave its consent "to the purchase by the United States of * * * Mare Island" for use as a naval and military reservation (and incidentally relinquished its title or interest to "beach" or tide lands on the eastern shore of the island from its southern point to the northern limits of "the highlands"), but provided that its consent to the purchase (and relinquishment of title) should not be construed as a satisfaction "of any conveyance or bond for title to the United States of the same

land" or as a recognition by the state "of any claim, title, or grant." Cal. Stat. 1854–1855, pp. 48–49; see also R. 457–458. 558.

11. *1856: State survey No. 34 of Swamp and Overflowed Land.*—On October 2, 1856, the lands here in dispute were surveyed by the Deputy County Surveyor of Solano County as "Survey No. 34 of Swamp and Overflowed Lands" (R. 383–387, see also 903, 947). It should be noted, however, that this is a state survey and that the lands thus surveyed cannot be located on any "approved and accepted *sectionized* survey of that particular tract of the United States Land Office" because no such *sectionized* survey by the land office exists (R. 390). [Italics supplied.]

County surveys.—In addition to this "Survey No. 34," three other surveys are mentioned in the record. On November 19, 1852, the County Surveyor for Solano County, at the request of Vaughn, Harkness, and Bynum, surveyed the highlands of Mare Island, south of the area here in dispute, under statutes relating to school lands (R. 752–757; Calif. Stats., 1852–1853, pp. 41–43). A similar survey under the same statutes was made for Josiah Hanscom on November 16, 1854, by County Surveyor Patton of Solano County, covering the lands here in dispute (R. 752, 757–759). It may be noted that these surveys, under the express provisions of the state statute, could not "prejudice the ownership or possession" of any lands held or

claimed under Mexican grants (*id.*, Sec. 6). On June 11–12, 1855, County Surveyor Patton again surveyed the lands for David N. Darlington (R. 587–589, 591–593; erroneously referred to as "Dyer Survey," 215). This survey reappears in "a tracing of a portion of Mare Island, prepared October 1900, to accompany papers relating to the claim of E. H. Sawyer to 165.55 acres of Swamp and Overflowed Land" (R. 455–456, 787–789).

12. *1857: State patent to Darlington.* — On March 18, 1857, the State of California issued its patent to the lands here in dispute, usually known as "Swamp and Overflow Survey No. 34," to David N. Darlington (R. 30–33) who divided his interest with Moody, Hanscom (who had had the lands surveyed under the school lands legislation, *supra*), and Secor (R. 388–389), all of whom were in some capacity connected with the Navy Yard (Gregory, *History of Napa and Solano Counties, California*, pp. 77–86). On June 6, 1879, 22 years after its issuance, the Darlington patent was recorded (R. 30–33; 388, Pl. Ex. I–1, original).

13. *1863: The "Dyer" Survey.*—On March 4, 1863, Surveyor General Beale approved as correct a survey, apparently of the eastern shore of Mare Island Straits, the plat of which included a rough outline of the southern part of Mare Island proper (Pl. Ex. A, original; same Def. Ex. 12 and 14; see also 215, 391, 798–799). Except that the island is labeled, at the point here in dispute, as "Mare," and

an unbroken shore line is shown, the exhibit would seem to have no particular value. It was made from earlier surveys, including one by Dyer in 1862.

14. *1873: The "Sanger" Report.*—On November 19, 1873, a naval board of civil engineers, which had been formed "for the purpose of revising the plan of the yard" and given particular instructions (R. 482–485), made its report (R. 486–530). Noting the questions raised as to the title, they pointed out in their report the use and need for the marsh or tule land as well as the so-called highlands (R. 488, 510).

15. *1873: Protest of commandant to State authorities.*—Commandant Rodgers of the Mare Island Navy Yard, who had expended much time and labor in the investigation of claims to the title of the marsh or tule lands (R. 488–489) and had secured the opinion of the Solicitor of the Navy on the question (R. 546, 558), on November 24 and 25, 1873, wrote the Board of Supervisors of Solano County and the Register of the State Land Office, protesting hearings by the state authorities on proposals "to reclaim tule land appertaining to Mare Island" and notifying them formally of the claim and occupation by the United States (R. 800–801, 838–839).

16. *1877: Freeman survey.*—On July 19, 1877, United States Surveyor General Rollins for California instructed James E. Freeman, United

States Deputy Surveyor, to make a survey of Mare Island (R. 563–569, same 707–708), as required upon application by the confirmees of any Mexican grant (13 Stat. 334, Sec. 6; 14 Stat. 220, Sec. 8). Freeman completed his plat (R. 562½), notes and general description (R. 572–582, same 711–720) during the same month. Publication reciting the completion and return of the survey was made by Surveyor General Rollins in the fall of 1877, as required by law (R. 698, and see R. 392). Surveyor General Ames, who succeeded Rollins on October 17, 1877 (R. 749), transmitted to the Commissioner of the Land Office on November 5, 1877, the tracing and account of Freeman (R. 700–701, and see R. 393). On November 16, 1877, the Commissioner of the General Land Office authorized payment for Freeman's services (R. 732), which he would not have done had he not approved the survey made by Freeman (393). On January 18, 1878, Surveyor General Ames executed his certificate reciting the publication, completion, and return of the Freeman survey (R. 570–571, same 709–710), and on August 6, 1879, Surveyor General Wagner, who had succeeded Ames on June 25, 1878 (R. 749–750), did the same upon the original plat (Pl. Ex. S, at R. 562½)—which neither would have done had they not been "satisfied with the survey as made by Freeman" (R. 393–394).

It may be noted that at this time it was not the practice and it was unnecessary for the Commis-

sioner of the General Land Office to specifically note his approval of such surveys (R. 751; *Tubbs* v. *Wilhoit*, 138 U. S. 134, 142–143). It may also be noted that "the Freeman survey accords very well with the surveys of the Coast and Geodetic Survey" (R. 762). "The Coast and Geodetic Survey is a survey of the exterior boundary of the high water line of Mare Island; that is, the mean high water is what they seek to portray. The Freeman survey is a segregation by so-called meander lines primarily for the purpose of determining the area and acreage of land involved in the property" (R. 763).

Edwin H. Sawyer, a former employee in the Navy Yard at Mare Island, who was corresponding clerk in the office of the Surveyor General of the United States for California in 1879, acquired the claim to the lands in dispute (R. 633–637, 641–652, 847, 751, 897). On July 5 and July 16, 1879, Bernard T. Hanley of Washington, D. C., as "attorney for owners", protested the Freeman survey by letters to the Surveyor General for California and the Commissioner of the General Land Office (R. 583–593), long after the time within which such protests were required to be made and without disclosing the name of the real party in interest (R. 570–571, 13 Stat. 332; see also R. 395). On August 7, 1879, in complying with requests by the Commissioner of the Land Office for copies of documents relating to the Bissell and Aspinwall

proceedings and the Freeman survey (R. 593, 732–733, 750–751), Surveyor General Wagner stated that he considered "the survey incorrect in that it not only includes tracts which are properly islands in themselves but also embraces a large quantity of tideland, and should be limited to the area contained south" of the lands here in dispute (R. 593–594, also 702–703). It is suggested in the record that he probably had in mind this boundary "as a property line, but that would not have any influence on the geographical situation" (R. 459–463).

In connection with litigation hereafter mentioned, on September 9, 1905, the Secretary of the Navy requested the Secretary of the Interior to make a survey of the Island (R. 744–745). Land Office Commissioner Richards, however, determined on September 22, 1905, that the Land Office could not undertake the survey because the land involved "is not public land of the United States, the same having been purchased by the United States from private land claimants * * * and there is no appropriation available out of which the expense of surveying other than public lands of the United States and reservations or abandoned reservations, under the jurisdiction of this office, could be paid" (R. 735–747, same 534–541).

17. *1887: Bouldin* v. *Phelps and San Francisco Sav. Union v. Irwin.*—In *Bouldin* v. *Phelps,* decided in 1877 by the Circuit Court for California, other claimants under the Castro grant brought an

action in ejectment against the commandant of the Mare Island Navy Yard. In finding against the plaintiff, the court held that, since plaintiff's claim had not been presented to the Board of Land Commissioners and confirmed, it was insufficient upon which to base an action for ejectment, and that the plaintiffs were entitled to assert no right under the Bissell and Aspinwall decrees, particularly since the confirmation proceedings were still *sub judice* because of the unsigned decree therein. In its opinion the court said, "We might well stop here" but because the commandant had questioned the genuineness of the Castro grant, the court undertook to express the view that it was invalid (30 Fed. 547, 563–564).

In *San Francisco Sav. Union* v. *Irwin,* Mr. Justice Field on circuit held that the marsh lands north of the lands here in dispute were below ordinary high water mark and hence not a part of Mare Island. It should be noted that the United States was not a party to this proceeding, it did not involve the lands herein dispute (R. 836–837), and in part it dealt with lands in Napa County which are not, and which the United States has not claimed as, part of Mare Island. 28 Fed. 708, affirmed 136 U. S. 578.

18. *1912: Application of California for patent from United States.*—On September 16, 1914, the Commissioner of the Land Office rejected the application of California for a patent to the lands here involved, because "no segregation survey"

had been approved as required by law and because, as part of Mare Island under a confirmed Mexican grant, they were not subject to the Swamp Act (R. 543–551).

19. *1914: Sawyer* v. *Osterhaus.*—Sawyer, who had been clerk in the navy yard and in the Surveyor General's office, *supra,* brought an action in ejectment against the commandant of the Mare Island navy yard and, in 1914, the District Court for California held that, in the absence of legal title which under the Swamp Act could only be derived by segregation of lands as swamp in character and without a patent, Sawyer had no standing to bring the action. The court also stated that "the evidence further shows" that the Government had maintained its possession over the lands since the establishment of the navy yard. 212 Fed. 765.

20. *1915: Lightfoot report.*—In compliance with a writ of mandamus issued from the Supreme Court of the District of Columbia (R. 181), W. J. Lightfoot, a United States Surveyor, was instructed on January 6, 1915, to make an examination and investigation of the swamp and overflowed lands of Mare Island. In his report of the same year, he concluded that they were a part of the island (R. 596–620).

21. *1923: Joy survey.*—On January 27, 1921, United States Cadastral Engineer Francis E. Joy was instructed "to determine the lands properly belonging to Mare Island in 1850" (R. 622–623).

He reported on October 23, 1922 (R. 622–629), concluding that all the marsh lands bounded by navigable water were parts of the island (R. 626–627). His plat, as corrected in accordance with further special instructions, was accepted in November 1923 (R. 43, 630–632).

22. *1925: Determination of swamp character of lands.*—In response to a further writ of mandamus issued out of the Supreme Court for the District of Columbia, the Secretary of the Interior determined that the lands here in question were "Swamp and Overflowed Land" at the passage of the Swamp Act in 1850 and on January 10, 1925, notified the Secretary of the Navy that the Land Office had determined that the lands were of such character but reserved decision whether they should be patented to California in order that the Navy Department might be heard. On February 12, 1925, the Secretary of the Navy replied, reciting the whole history of the matter (R. 552–562).

23. *1928: Patent from United States to California.*—On March 9, 1928, a patent of the United States was issued to California in compliance with a peremptory writ of mandamus from the Court of Appeals for the District of Columbia (R. 33–42), that Court stating in its opinion that "the mere issuance of patent to California determines no legal or equitable right of the United States in the premises." *Work* v. *United States,* 23 F. (2d) 136, 138.

24. *1930: Present suit filed.*—Finally, the United States instituted this suit in November, 1930, to

quiet title to the tract of land involved in State Survey No. 34. The District Court for the Northern District of California was asked to cancel both the patent issued by the United States to California in 1928, as a result of the mandamus proceedings, and the patent issued to Darlington in 1857 (Complaint, R. 2–43; amended 98, 126, 632).

I

THE CASTRO GRANT INCLUDED THE LANDS IN CONTROVERSY

Although the question was determined adversely to them by both courts below, respondents, without filing a cross-petition for certiorari, apparently seek to support the decree of the Circuit Court of Appeals by asking this Court to find as a fact that the lands in controversy are not a part of Mare Island (Br. pp. 31–45). The question thus raised is based upon a theory of law not heretofore advanced, and may be stated as follows:

> Whether it may now be successfully claimed that under the ancient Mexican law the marsh lands contiguous to the highlands were not a part of Mare Island and therefore were not conveyed to the United States under the Castro grant—even though (1) both courts below have found that the lands are part of the island; (2) the uncontradicted evidence shows that the whole area of both tule and uplands is surrounded by navigable and flowing water, and presents a continuous, unbroken shore line; (3) the

lands involved rise to an elevation well above the mean highest tide; (4) the grant confirmed in the 1850's was for "Mare Island . . . bounded by the water's edge" or "with its natural boundaries"; and (5) the tule lands have always been claimed as part of the island.

Whether the lands were part of Mare Island was the principal issue at the trial, about three-fourths of the record being devoted to it, and the trial court made comprehensive findings upon which the question was determined adversely to respondents (R. 162, 164, 167, 168, 170, 173, 175, 178, 182, 185, 191, 195, 196, 197, 199). Respondents also fail to note that on appeal, the court below concurred in the trial court's findings, it being stated in the opinion (R. 967) that "the lands are a part of Mare Island, northwesterly of the main plant of the Mare Island Navy Yard."

Respondents now ask this Court to review 1,000 pages of record and a great number of original exhibits (consisting mostly of maps, charts, surveys, and documents of various types) and to conclude therefrom that the conclusion reached by the courts below is "plainly erroneous or unsupported by the evidence." *Virginian Ry.* v. *Federation,* 300 U. S. 515, 542; *Alabama Power Company* v. *Ickes* (Nos. 84 and 85, October Term, 1937. Decided January 3, 1938.)

That the findings below are amply supported by the evidence of record is clear. To show that the

lands here involved had always been a part of Mare Island, the Government introduced more than forty maps and charts, dated from 1775 to the time of trial, showing that the site was in fact an island and that the lands here in dispute were not separated from the highlands by a waterway of any kind. Despite respondents' assertion to the contrary (Resp. br. 32), some of the maps dated between 1775 and 1850 show the site as an island (1775, Pl. Ex. L–1, R. 397, 478; Spanish map, undated, Pl. Ex. L–3, R. 398–399, 478; 1825, Pl. Ex. L–5, R. 479; 1848, Pl. Ex. L–8–A, R. 404; 1850, Pl. Ex. L–11, R. 406–407).

All of them, with the single exception of the official state map of California of 1854 which was obviously and admittedly "a broad burlesque upon the topography of California" (R. 890; see also 862–892), show an unbroken shore line from Napa River to Sonoma Creek along San Pablo Bay—thus eliminating the possibility of a waterway separating the lands here involved from the "uplands" which are admittedly part of Mare Island. (R. 435–436; 397; 397–398, see origin' Pl. Ex. L–2; 399; 400; 401; 402; 403; 404; 405; 760, see original Pl. Ex. L–8–C; 406; 406–407; 408; 409; 410; 411–412; 413–414, see original Pl. Ex. L–17; 418; 419; 421, 424–425; 427; 427–428; 428–429; 429–430; 431; 432; 433–434; 435; 449–450, see original Pl. Ex. L–31; 761, see originals of Pl. Exs. L–32, L–33, L–34, L–36, L–37, L–38; 834–836, see original Pl. Ex. 00; 846–847, see original Pl. Ex. TT; 790–792, see

original Pl. Ex. JJ; 792–793, see original Pl. Ex. KK). The even and crescent-shaped shore line of San Pablo Bay, which is the south or western boundary of Mare Island, has come to "a state of balance or equilibrium between eroding and upbuilding forces" (R. 435–436).

Counsel for the defendants below, after the sixth government map had been introduced, offered "to stipulate that the government can produce a hundred additional maps of similar character * * * Spanish maps, English maps, and French maps * * * showing an unbroken shore line from Carquinez Straits to Sonoma Creek" (R. 401). At two points in the record, however, they submitted for identification or introduced several drawings or sketches of the Navy Yard (dated from 1886 to 1925) upon which they sought to show notations of tide lines across the isthmus connecting the "uplands" with the main body of marsh, but in each case an inspection of the original indicates that these drawings do not bear any such construction. (R. 451, 467, 468, 763; 451–452, 468, 764–765; 452, 454–455, 471, 474–475, 790; 453, 473–474, 787; 455–456; 456; 456–457.) Many of the maps, of course, including those introduced by the Government, have lines indicating the boundary at the isthmus between upland and tule (see, for example, R. 430–432, 415–418, 450).

Testimony in connection with the maps deals with definitions of upland (R. 789), waterway (R. 439, 441, 448), tule (R. 441, 450–451, 463–464),

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marsh (R. 433, 445), and tides (R. 440, 449, 793, 794, 796, 802, 806). Some of the maps after 1915 carry designations of the tract of tule as "Island No. 1" and the uplands as "Mare Island," but it was shown that this was merely a method of identification which has since been discontinued and which did not indicate non-contiguous land (R. 434, 442, 443, 444, 446, 463, 464, 560, 628, 760).

The isthmus connecting the uplands with the large tract of tule or marsh was shown to be in part originally a "sand shell ridge," since depleted by removal of sand for construction uses (R. 766, 767, 772–773, 782, 811). These barrier ridges or dunes were constantly built up by wind and wave action (R. 818, 832–833). If they had not been "high enough to withstand the action of the waves," they "would be all swept away" (R. 833). Even in recent years these ridges are still "about waist high" (R. 837). The "*lowest possible* elevation of the low and tule land" area of the isthmus "east of the Sand Ridge or Barrier" in 1852 was ".67 of a foot above mean or ordinary high water" (R. 815, italics supplied). It should also be noted that the building of dykes and reclamation of the land "prevents any increment" and "also causes a settling of the soil by evaporation." Plowing and other operations also deplete the surface (R. 797, 817, 849–850).

All of this evidence conclusively shows that there is and always has been a continuous unbroken *mean*

high tide shore line all around the Island from the Straits of Carquinez on the south, to Mare Island Straits and Napa River on the east, through Navy Yard Slough to Sonoma Creek on the north, and to San Pablo Bay on the west. In short, the testimony shows that under every common law concept there has always been only one island, Mare Island, and that its northern boundary is far north of the lands here involved.

Respondents now seek to overcome this evidence by asking for the first time (Br. 31–37) that judicial notice be taken of provisions in the ancient Mexican law which, they claim, limit the extent of the Castro grant to a grant of the uplands from the point annually reached by the *highest* high tide. From this, it is then argued that the evidence shows that the lands in controversy "were entirely below the line of the highest regular tide" (Br. 32) and, therefore, were not included in the description of the grant to Castro.

It is the position of the Government that (1) this contention is not properly raised at this stage of the proceedings; but should the Court determine to consider it, the argument is untenable for three reasons: (2) the facts upon which it is predicated are contrary to the facts found in the record; (3) nothing in the Mexican law requires a different conclusion from that reached by the courts below; (4) the decrees of confirmation, followed by the Freeman Survey, are conclusive and must be construed according to the common law.

1. *Respondents are not in a position to raise this new contention.*—As has been indicated, respondents have not filed a cross-petition for a writ of certiorari in this Court to review the findings made by the two courts below that the lands in controversy are a part of Mare Island. They must also admit that the question of Mexican law relative to tide water boundaries, which respondents now raise, was not raised either in the trial court or before the Circuit Court of Appeals.

Under these circumstances, it is submitted, respondents are not now in a position to raise this contention before this Court. While it is undoubtedly true that this Court has the power to consider objections to rulings adverse to the respondents even in the absence of a cross-petition (*Langnes* v. *Green*, 282 U. S. 531, 537–538), the Court will not consider contentions not raised in either court below except in exceptional circumstances even though the argument offered be in support of the decree. *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, 498; *Prudence Co.* v. *Fidelity Co.*, 297 U. S. 198, 208; *Zellerbach Co.* v. *Helvering*, 293 U. S. 172, 182; Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 389, p. 787. It is equally well recognized, throughout a long line of decisions in this Court, that it is incumbent upon respondents in such a case to persuade the Court that it should entertain the novel contention. As was said in *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73, 88,

"If the power exists, respondent has not persuaded us that our discretion should be moved to use it."

Obviously, respondents can advance no persuasive reason to justify a departure from the general rule in the present case. As is stressed throughout other portions of respondents' brief, the question of the ownership of swamp lands on Mare Island has been before the courts a number of times, beginning with *San Francisco Sav. Union* v. *Irwin*, 28 Fed. 708, decided on July 8, 1886. In none of these cases was the contention, here advanced by respondents, raised. Again, as has been pointed out, the principal issue at the trial of this cause was the extent of the lands owned by the United States. Both parties at the trial assumed that the common law rule prevailed that a grant of riparian lands extended to the mean high water mark (*Borax, Ltd.*, v. *Los Angeles*, 296 U. S. 10, 22). Accordingly, voluminous testimony was introduced, and both parties made their proof on the basis of that doctrine. Hence, it is clear that the injection of the contention at this stage, without any explanation, comes as a wishful afterthought, and manifestly there is no reason why the Court should entertain it.

2. *The annual highest high tide did not reach across the northern end of the highlands.*—However, if the Court determines to consider respondents' contention, it is the position of the Govern-

ment that the facts upon which it is predicated have no basis in the record.

Respondents' entire argument is bottomed upon the factual assertion (Br. pp. 31–32) that "the evidence all agrees, . . . that they [the lands in controversy] were overflowed by the tides several times a month (R. 803–805, 815), and were entirely below the line of highest regular high tide (R. 622–627, 729, Pltff's. Ex. KK, original)." By the "line of the highest regular high tide" respondents mean "the line reached by the highest tide during the year" (Br. 33).

The Court's attention is respectfully directed to Plaintiff's Exhibit NN (R. 530½) prepared under the direction of Captain Carl A. Carlson, Captain in the Civil Engineering Corps, United States Navy (R. 762), and to his explanation thereof (R. 815–828). This exhibit consists of a plat of cross-sections of the land in controversy, made from actual surveys in 1856, 1906, 1917, and 1931, which shows the profiles of the land and tides for each of these years according to the "usual engineering method" (R. 807). Attention is particularly directed to the second profile from the bottom on the exhibit, designated as "Station 60," which corresponds to the southern boundary of the lands claimed by respondents (R. 809). Following the heavy black line, which is drawn to indicate the elevation of the land at this Station in 1852 (see explanatory notes "Re-Station 60" at lower

right of the exhibit), the Court will readily see that the land in this section was at that time, and is now, well above the spring high tide, or, to use respondents' language (Br. p. 33), "the highest tide during the year."[2] This evidence, uncontradicted and undisputed by respondents, conclusively proves exactly the opposite of their assertion that "at several times a month . . . the tides reached to the bank at the northern end of Mare Island [as they describe it] which was the dividing line between the uplands owned by the United States and the swamp lands to which respondents hold title" (Br. p. 34).

Further reference to the other stations shown on this exhibit definitely proves that all of the land here in controversy is well above the "line of the regular highest high tide" upon which respondents rely. It is true, as shown by the enlarged section on Station 2, redrawn to a larger scale at the bottom of the exhibit, that the storms of December 1914 and 1921 caused the tide to rise three feet above the mean high water mark or about one-tenth of a foot above the so-called boundary land at Station 60, but such tides are far higher than the "highest regular high tide during the year." Furthermore, if such extreme storm tides be the

[2] For an explanation of the various tides, see testimony of Captain Carlson in the instant case, R. 793–797, and the opinion of this Court in *Borax, Ltd.*, v. *Los Angeles*, 296 U. S. 10, 23.

criterion by which boundaries may now be determined, titles to land along the whole west coast of California and along both coasts of Florida rest on extremely tenuous grounds.

It is to evidence of such sporadic storms that respondents point in their record references (Br. 31–32), but clearly such testimony falls far short of establishing a basis for the doctrine they assert, i. e., the highest regular high tide during the year. As Captain Carlson said, the extraordinary high storm tides arise "but once in ten years" (R. 792). Respondents particularly rely (Br. 31) upon three plates introduced in evidence by the Government (R. 802–805), showing the tidal regimen for November 1929 and for February and June 1905, which indicate that the tides rose as much as a foot above *mean* high water mark during those months. It is clear that these plates completely harmonize and corroborate Plaintiff's Exhibit NN, since each of them shows that during these specimen months the tides did not rise to the elevation of the land shown on that exhibit. They squarely disprove the contention that the lands here involved were inundated by the tides several times a month.

Nor is there anything in the "surrounding circumstances" to which respondents point that proves that Mare Island consisted of no more than the highlands (Br. p. 35). It is abundantly shown that the whole body of tule land has uniformly been treated and claimed as part of Mare Island—in the

grant Castro claimed (Mare Island "in all its extent", R. 19, also 250, 560), the Sloat Board[1] correspondence (Mare Island "with all its appendages," R. 324, "a large tract of tule extending toward Napa and Sonoma," R. 325, see also 842–844), the negotiations with Bissell who wanted five times as much per acre for upland as for "the main body of the tule or low ground" (R. 368, 369), in the contract with and deed to the United States (Mare Island "including all the tule or lowland, and marsh, belonging to the same, or which has ever been reputed or claimed to belong to the same", R. 296, 313, 780, 781) and bond ("Mare Island and its appurtenances", R. 310), the selection and reservation as a navy yard (Mare Island "and its appendages of Tule or Marsh land ordinarily reputed to belong to said island", R. 381), the report of the Sanger Board (R. 486, 488, 489, 510), the pro-

[1] Respondents attempt to infer from statements made in the Sloat Board Report that the Board was of the opinion that the lands in the instant case were not a part of Mare Island (Br. p. 36). However, it is clear from the Board's letter to the Secretary of the Navy, written a month later, that the Board found the Island to contain "about nine hundred acres *in addition to a large tract of tule extending toward Napa and Sonoma.*" (R. 825. Italics supplied.) They also (Br. 6, 36, 83) assert that the Sloat Board "surveys" limit the island to the uplands, but the drawings accompanying the report of the Board (Pl. Ex. G, original) do not purport to include the whole island—they are merely a proposed plan of the structures and a sketch of the topography of the area covered thereby and, moreover, they show at least part of the isthmus here in dispute.

tests of the commandant in 1873 to state authorities (R. 800–801), the Freeman Survey (R. 562½), the report of the United States Surveyor General for California for 1883–1884 (R. 531), the rejection of California's application for a patent (R. 550), in *Sawyer* v. *Osterhaus* (R. 560–561, 599–600), the Lightfoot Report (R. 602), and the Joy Survey (R. 626–627.) Moreover, California's act of session, *infra,* p. 41–43, by limiting its grant of tidelands on the eastern shore of the island to "a parallel intersecting the northern point of the highlands" recognized that the island extended north and west beyond the lands here in dispute.

Typical of respondents' struggle to overcome the overwhelming facts of record is their attempt to limit the boundaries by bits from the record relating to area. References to "half a league" they compare with "half a league *square*" (Resp. Br. 11, 35, 40, 41), which is only a quarter of a league. But a Spanish land league used in California surveys was a measure of area, not distance (Webster's Unabridged Dictionary, 1935), and, according to the very case respondents cite (*United States* v. *Perot,* 98 U. S. 428, 432; br. 35), contains 4,340.278 acres. "Half a league" would then be 2,170.139 acres rather than 1,085 acres. Thus, "half a league" is not "surprisingly close" (Br. 35) to respondents' contention that the area of the island is 897 acres. Any doubt that remains may be

put at rest by a reference to Vallejo's testimony that the island "contains" about half a league (R. 238), which could only mean the league as a measure of area.

3. *Findings of the courts below are not erroneous under Mexican law.*—It is the further position of the Government that the provision of the Mexican law relied upon by respondents, to the effect that the boundary of the seashore is the line reached by the highest tide during the year (Br. p. 33), is not inconsistent with the findings of the trial court that the Castro grant conveyed all the land to the mean high water mark. The whole section of the Code provision, in force at the time of the grant, which respondents cite (Br. p. 33) is as follows (Las Siete Partidas, Part III, Title 28, Law 4):

> Every man can build a house or a hut on the sea shore which he can use whenever he wishes; and any person can erect there another edifice for his own benefit, provided the common custom of the people is not violated; and he can construct galleys and any other kind of ships and dry nets there and make new ones if he desires to do so; and so long as he is working there or is present no one else should molest him so that he cannot use and be benefited by all these things, and by others like them, in the manner aforesaid; *and all that ground is designated the shore of the sea which is covered with the water of the latter at high*

tide during the whole year, whether in winter or in summer. [Italics supplied.]

Certainly there is nothing in this section which precluded the court from finding that the grant conveyed the lands to the ordinary high water mark, perhaps with the right of the public to use the fore shore. Mexico, through its authorities, could grant even the seashore. *Cf. Jover* v. *Insular Government,* 221 U. S. 623; *United States* v. *Coronado Beach Co.,* 255 U. S. 472. Moreover, there is no evidence in the record to show that any of the lands here involved were, as required by the Code provision cited, "covered with the water of the [sea] at high tide during the whole year."

Moreover, the grant from Governor Alvarado to Castro conveyed the whole of Mare Island "in all its extent" (R. 251), and it is clear that the definition of an island under the Civil Law is the same as that accepted by the courts of this country, *i. e.,* a body of land entirely surrounded by a natural and constant flow of water—and the mere fact that the land may be surrounded by water occasionally or at high tide does not make it an island. *McBride* v. *Steinweden,* 72 Kan. 508, 515 (1906); *State* v. *Barco,* 150 N. C. 792, 797 (1909); *Payne* v. *Hall,* 192 Iowa 780, 789 (1921); *Zeller* v. *American International Corporation,* 292 Fed. 822 (C. C. A. 3). In the Civil Law an island is defined as "a certain portion of land entirely surrounded by the waters

of the sea or of a river."[4] See, Partida III, Title 28, Laws XXVII–XXX (Scott's Translation, 1931). Hence it is submitted, that when Governor Alvarado granted to Victor Castro the whole of Mare Island "in all its extent" he granted an island surrounded by a continuous flow of water and not by a sporadic high tide or storm spray, as respondents contend.

4. *The decrees of confirmation, construed by the common law, conclusively establish the extent of petitioner's title.*—It is the position of the Government that the decrees rendered by the Board of Land Commissioners and the District Court on appeal conclusively established the title of Bissell and Aspinwall, petitioner's grantors, to "Mare Island . . . being an island . . . bounded by the water's edge" (R. 780) or "with its natural boundaries" (R. 286, 290), *i. e.*, the mean or ordinary high water mark.

The Board of Land Commissioners had before it a petition in which title to the whole of Mare Island "in all its extent" was sought to be confirmed (R. 220, 250–251). It was the duty of that Board to "ascertain and settle" the extent of that title, pursuant to "the Treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and cus-

[4] "ISLA. Cierta porcion de tierra rodeada enteramente de agua por de mar ó por algun rio." Dictionario Razonado de Legislacion y Jurisprudencia. Por Don Joaquin Escriche (Magistrado Honorario de la Audencia de Madrid). Nueva Edicion (Paris, Mexico, 1925), p. 934.

toms of the government from which the claim is derived" (Act of March 3, 1851, c. 41, § 11, 9 Stat. 631). It must be presumed that in the performance of that duty the Board took judicial notice of the "highest high tide" doctrine of the Mexican law, as well as the Civil Law definition of an island, and having done so, determined that the grant extended to the "water's edge." Therefore, conceding the correctness of respondents' contention (Br. pp. 37–45) that confirmatory decrees could not enlarge or initiate a title to land, it is submitted that under the decisions of this Court the words "water's edge" or "natural boundaries", found in the decrees in the *Bissell and Aspinwall* case, must be construed to mean the ordinary high water mark. To quote from respondents' most favored case, *San Francisco Sav. Union* v. *Irwin,* 28 Fed. 708, aff'd. 136 U. S. 578, involving other lands on Mare Island, Mr. Justice Field said (28 Fed. 713):

> By the common law—*and by that law must decrees written in the English language be interpreted*—the boundary of the island, so far as its ownership as private property is concerned, is determined by *ordinary* high-water mark. The shore, which belongs to the public, is the line between that mark and low-water mark, over which the *daily* tides ebb and flow. *United States* v. *Pacheco,* 2 Wall. 589. [Italics supplied.]

In *United States* v. *Pacheco,* 2 Wall. 587, the district court had confirmed the survey and location

of a floating Mexican grant for three square leagues of land, situated on the east side of the Bay of San Francisco. The decree described the land as bounded "on the west by the Bay of San Francisco." The survey embraced marsh land covered by the monthly tides, but excluded lands covered by the daily tides. From the decree approving this survey the United States took an appeal to the Supreme Court in the interest of the settlers on the upland, who desired to have the floating grant so located that the bay, as a boundary, would be the line of low-water mark, thereby including in the grant marsh lands covered by the daily tides, and excluding an equal amount of upland. Mr. Justice Field, delivering the opinion of the court, said (pp. 589–590):

> The decree of the District Court confirms the claim of the respondents to the extent of three square leagues, and describes the land as bounded * * * on the west by the Bay of San Francisco. * * * On the side of the bay there are about two leagues of salt or marsh land. The whole of this land is covered by the monthly tides at the new and full moon, and a part of the land is covered by the daily tides. And the objection taken to the survey approved by the District Court is that it does not include this marsh land as part of the tract confirmed. The objection is made on the supposition that the lines given by the decree do not close; that a fourth line is necessary to com-

> plete the boundaries, and that this fourth line must be determined by the quantity confirmed, and so drawn as to include it; and that by the bay as a boundary in this case is meant the line of low-water mark. * * * By the common law, the shore of the sea, and, of course, of arms of the sea, is the land between ordinary high and low-water mark, the land over which the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails. 3 Kent, Comm. 427. And there is nothing in the language of the decree which requires the adoption of any other rule in the present case. If reference be had to the rule of the civil law, because the bay is given as a boundary in the grant from the Mexican Government, the result will be equally against the position of the appellants.

The *Pacheco* case has been followed in *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10, 22–23; *Shively* v. *Bowlby,* 152 U. S. 1, 29; *People of Porto Rico* v. *Fortuna Estates,* 279 Fed. 500, 506 (C. C. A. 1); *Coburn* v. *San Mateo County,* 75 Fed. 520 (C. C. N. D. Cal.). Cf. *More* v. *Massini,* 37 Cal. 432 (1869). See also, *San Francisco* v. *LeRoy,* 138 U. S. 656, 670, 672.

It therefore follows that the decrees of the Board of Land Commissioners and of the District Court, on appeal, are a complete answer to respondents' argument. Moreover, pursuant to these decrees,

and as required by Section 13 of the Mexican Claims Act, as amended by Section 1 of the Act of July 1, 1864 (ch. 194, 13 Stat. 332), an official survey was made of the land so confirmed, known as the Freeman Survey (R. 562–594), by which the boundaries of the Island were conclusively[5] determined to be "the water's edge at ordinary high water mark" (R. 575), and the Island found to contain an area of $5227^{22}/_{100}$ acres (R. 579).

Although it was received in evidence without objection on their part (R. 562), respondents would now attack the validity of the Freeman Survey (*supra*, pp. 11–14) on the ground that it was not shown that the Commissioner of the General Land Office had endorsed a certificate of approval thereon, as provided in Section 1 of the Act of July 1, 1864 (Br. p. 43). This section provides for the endorsement on the survey of a certificate of approval by the Commissioner of the General Land Office only when objections are made to the survey within 90 days after its publication. In the instant case, as the trial court found, no objections were made to the survey within the statutory period.[6] And thereupon, as required by the statute, the Surveyor General, after approving it, forwarded the survey to the Commissioner of the General Land

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[5] *Knight* v. *U. S. Land Ass'n*, 142 U. S. 161, 182, 205–206; *United States* v. *Hancock*, 133 U. S. 193, 197; *Cragin* v. *Powell*, 128 U. S. 691, 699; *Tubbs* v. *Wilhoit*, 138 U. S. 134.

[6] See Footnote No. 12, page 28, Brief for the United States.

Office (R. 167–168). It is clear, therefore, that the provision of the statute relied upon was fully satisfied in the instant case.

Furthermore, it will be noted that none of the cases cited by respondents (Br. p. 43) discuss the question of what constitutes an approval by the Commissioner, nor do any of them hold that the Commissioner's approval must be indicated by endorsing on the survey a certificate of approval. On the contrary, the opinion of this Court in *Tubbs* v. *Wilhoit*, 138 U. S. 134, which respondents attempt to distinguish on the ground that the statutes were dissimilar, is on all fours with the question here presented. In that case the Court held, per Field, J., that although the Act of July 23, 1866 (14 Stat. 219, c. 219, § 4) provided that "it shall be the duty of the commissioner of the general land office to certify * * * approved plats," the duty imposed was ministerial, and that a plat of swamp lands prepared according to law, certified by the Surveyor General for California, copies of which were filed in both the General Land Office and the local land office, was sufficient upon which to base a patent, despite the failure of the Commissioner to endorse his approval thereon.

In the instant case the trial court made the following finding of fact with respect to the approval of the survey (R. 167–168):

> In July, 1877 the Surveyor General of California in compliance with the 13th section of the Act entitled "An Act to ascertain

and settle the private land claims in the State of California," approved March 3, 1851, caused said private land claim for Mare Island to be surveyed and a plat to be made thereof, and thereafter gave due notice that same had been done by publication once a week for four consecutive weeks in two newspapers, one published in the City of San Francisco, to wit, "The Alta California" and one published near the Land Surveyor, "The Vallejo Evening Chronicle", published in the City of Vallejo, County of Solano, State of California, and retained in his office for public inspection the survey and plat until ninety days from the date of the first publication in San Francisco expired; that no objections were made to said survey and the said Surveyor General of California duly approved the same and transmitted a copy of the survey and plat thereof to the Commissioner of the General Land Office at Washington, for his examination and approval. Thereafter the Commissioner of the General Land Office duly approved said survey and plat and caused the same to be filed in a jacket called "The Mare Island Jacket" in the file of military reservations in the General Land Office; thereafter on September 22, 1905, the Commissioner of the General Land Office expressly approved, used, and acted on said survey and plat and thereafter, on September 28, 1905, the Secretary of the Interior expressly approved and concurred in said action of the Commissioner

of the General Land Office, and approved, used, and acted on said survey and plat.

There is ample evidence to support the finding (R. 562–594, 698–751), and the facts so found come squarely within the rule of *Tubbs* v. *Wilhoit, supra.*

It is therefore submitted that the decrees of confirmation and the official survey made pursuant thereto and as required by law, conclusively established that the boundaries of Mare Island extend to the ordinary high water mark, and that the ancient Mexican doctrine relied upon by respondents is wholly irrelevant.

II

THE DECREES OF THE BOARD OF LAND COMMISSIONERS AND OF THE DISTRICT COURT ARE CONCLUSIVE UPON RESPONDENTS

Respondents have not met squarely the various reasons advanced by the Government for holding the decrees in *Bissell and Aspinwall* v. *United States* conclusive on them. They have persisted in assuming that the decree of the District Court was ineffective when given and ordered to be entered in 1857, because not signed by the judge. They apparently rely entirely upon a dictum in *Bouldin* v. *Phelps,* 30 Fed. 547, and the decision of the court below. By treating the decree as ineffective until 1930, when the *nunc pro tunc* decree was entered, they seek to avoid the effect of their laches. But the matter has been settled by the controlling cases cited in the Government's brief, pp. 35–39.

They have abandoned the position taken by the court below that California was a third party under the statute (Br., pp. 46–47) and in portions of their brief seem unwilling to take its position that the Government was guilty of "intentional fraud" (Br., p. 64) although elsewhere they argue that the proceedings were not conclusive on them because the suit "was fictitious and collusive" (Br., p. 47). They seem also to weaken on the proposition that the United States was a trustee "in the strict sense" (Br. 69) though seeking still to be treated as cestuis. The cases which they cite are all cases in which the point of trusteeship is not involved. They are cases in which the entire beneficial interest is in the grantees and the Government is said to be a trustee in the same loose way that a vendor is often said to be a trustee for his vendee; or a mortgagee, a trustee for his mortgagor. Respondents do not refute the rule that as a cestui California (and its successors) would be bound by the decree if it acquiesced or participated in the proceedings, nor the rule that as a cestui it and its successors might be barred by laches.

1. *California acquiesced in the decrees.*—The only answer made to the Government's showing of acquiescence on the part of California (Brief for the United States, 51–52, 58–60) is that the California legislature failed to include the land in question in its cession of lands to the United States. But California consented to the "purchase" of Mare Island and in the consenting act indicated its

cooperation with the Federal Government with respect to the proceedings which were then pending before the Land Board (Brief for the United States, 51–52, 58–60). California thus knew that the United States had taken a conveyance, which included the swamp lands as part of Mare Island.

Ignoring the consent to the purchase of the entire island, respondents point to another portion of the California Act of 1854 granting to the United States the "overflowed beach or swamp land on the eastern shore" of the Island (Calif. Stats., 1854–1855, pp. 48–49, Sec. 2), and upon that provision insist that California did not only fail to consent "to the loss of her rights in the land in controversy" but also thereby intended to retain its title to all other lands (Br. pp. 8–9, 59, 69, 82). However, in addition to ignoring the first section, respondents misunderstand the nature and purpose of the second section of the California Act of 1854. It is clear from the opinion of Attorney General Cushing (8 Op. A. G. pp. 422–427) and the California Senate Journal (1854, p. 37 and Appendix Document No. 4) that California was asked to cede and intended to cede tidelands, rather than marsh lands above mean high water mark. In other words, before a Navy yard could be constructed, it was necessary that the United States have title to the tidelands *below* mean high water mark, upon which the principal Navy yard wharves, docks and structures were to front. In short, a third type of lands is here in-

volved—the tidelands, as distinguished from marsh or uplands. Such tidelands would belong to the state, whether the Castro grant were valid or not (8 Op. A. G. at 425), since it is not claimed that the grant extended beyond ordinary high water mark.

While Attorney General Cushing, in his opinion (8 Op. A. G. at pp. 425–426), referred to, and perhaps was not entirely clear as to the effect of, the newly enacted Swamp Act, he was concerned with land "all below high water mark" or "tide water shore land." He mentioned the Swamp Act only as it referred to "other overflowed" land and, in his opinion, italicized these quoted words (8 Op. A. G. at 426). On the indispensable need of title to the tidelands, he concluded rhetorically:

> Nay! how can the United States enjoy the use of Mare Island as a Navy Depot, while its entire shore belongs to California, whose rights of property may shut up the Island against all access of ships as effectually as if it were surrounded by a wall of granite.

Obviously he was referring to tidelands adjoining the uplands, as well as those tidelands adjoining the tule lands. California complied by ceding "*overflowed* beach or swamp lands"—in its statute thus referring to both types of lands mentioned by Cushing in his opinion, in its eagerness to secure the naval station upon its shores. California has since granted to the United States the remaining tidelands (California Statutes, 1897, pp. 74–75).

In this connection, respondents may have been misled by the loose use of phrases in the main brief for the United States. There, the phrase "other swamp lands" in the nineteenth and twentieth lines on page eight should be "tide lands"; the phrase "similar swamp lands" in the twenty-fourth line on page forty-six should be "tide lands"; and the phrase "other swamp lands" in the twenty-first and twenty-second lines on page fifty-one should be "tide lands."

Moreover, that both California and respondents' predecessors acquiesced in the decrees is irrefutably shown by the failure of either of them to protest against the approval of the Freeman Survey until long after the statutory period for filing such protests had expired.[7]

That California has always believed that these lands in question had passed to the United States is shown by the fact that no tax had ever been assessed to anyone upon these lands (R. 477),[8] despite the patent to Darlington in 1857. The State would have levied such a tax had it considered the lands to be in private ownership.

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[7] See, pp. 11–14, 36–39, *supra*, and Brief for the United States, pp. 28–29.

[8] There is an indication in the record that, after the issuance of the patent to California in 1928 as a result of *Work* v. *United States*, the heirs of Sawyer paid taxes for 1873, with interest (R. 646–648), but the County Assessor's records show no evidence of this certificate of redemption from tax sale (R. 477).

Taking all these things into consideration, it becomes apparent that California acquiesced in the litigation and the successors of California should be estopped from assailing the conclusiveness of the decrees.

2. *Respondents are barred by laches.*—Assuming, however, that California was a cestui and did not acquiesce in the proceedings and was wronged thereby, the State and respondents are barred by laches. Respondents in their brief fail to rebut the Government's showing of laches (Brief for the United States, pp. 60–65). It it clear that despite the fact that California was perfectly aware of the proceedings with respect to these lands in 1854, no legal steps of any sort were taken by it or any of respondent's predecessors to assert rights until 1905 (Br. p. 72).

Respondents' statements (Br. 70–73) as to their activities and the activities of the Government must be subjected to the same corrections to which attention has been called by the Government in that portion of this brief, *infra,* dealing with adverse possession. It is also to be borne in mind that the period of laches might bar relief considerably short of the period of a statute of limitations and the period would begin to run even prior to taking possession of the land. Respondents' right to attack the conclusiveness of these decrees was barred by laches long prior to 1905.

3. *The adversary nature of the proceedings.*—To refute the Government's contention that the proceedings before the Land Board are conclusive, even granted that they were nonadversary, respondents have been forced to rely on general language found in some cases in which the point was not involved (Br. 50 *et seq.*). This language is to the effect that proceedings before the Board were judicial in character. In addition they appear to rely particularly on *United States* v. *Throckmorton,* 98 U. S. 61, a case denying the Government the right to set aside a confirmation decree alleged to have been obtained by fraud. In that case this Court made a statement recognizing that decrees might be set aside in cases where the unsuccessful party had been prevented from fully exhibiting his case, by fraud or deception practiced on him by his opponent. It is difficult to derive from that case the rule that proceedings before the Land Board must be adversary in character.

The one other case on which respondents rely is *The United States* v. *Ritchie,* 17 How. (58 U. S.) 524. That case, clearly indicating that the Land Board was an administrative tribunal, held that, upon what is called an appeal from the Board, the District Court hears the case *de novo.* But even though adversaries be necessary before the reviewing tribunal, it does not follow that they are necessary before the tribunal below. As has been pointed out in the Government's main brief (p. 68), the

decree below need not fall because a review would not be possible in the particular case by reason of the non-adversary character of the proceedings.

Nor do the long list of cases on which the respondents rely in support of their contention that the proceedings before the District Court were a nullity cover the situation which existed in *Bissell and Aspinwall* v. *United States*. In none of them were the parties to the proceedings interested in opposite results being reached in proceedings conducted in the utmost good faith.

No further discussion seems necessary in reply to the portion of respondents' brief dealing with the conclusiveness of the decrees since it is believed that nothing appears therein to shake the position of the Government set forth in its main brief that California was not a third party under the statute; that adversary proceedings were not necessary before the Board of Land Commissioners, and that its decree would be binding on the respondents even assuming that the decree of the District Court should fail; that the requirements of adversary proceedings were satisfied both before the Land Board and the District Court, before which tribunals the Government proceeded in the utmost good faith and with an utter absence of fraud on its part or collusion with Bissell and Aspinwall; that in these proceedings the United States was not a trustee for California; that even if it was, the acquiescence of California in these proceedings would estop it and respondents from attacking the

decree; and that in any event the respondents would now be barred by laches from assailing the decree of the District Court which became effective in 1857.

III

THE UNITED STATES HAS ACQUIRED TITLE BY ADVERSE POSSESSION

Unable to contradict the evidence in the record upon which the trial court found that the Government has acquired title to the lands in question by adverse possession, respondents nevertheless purport to deny the validity of that title, (1) by an attack upon the presiding District Judge; (2) by factual assertions that do not accurately reflect the record; (3) by an attempt to impeach the probity of a principal witness for the Government; (4) by a contention that the United States could not acquire title by adverse possession against the respondents until it had issued a patent to them.

1. *The findings of the trial court.*—In an attempt to avoid the force of the findings of fact made by the trial court to the effect that the Government has been in adverse possession of the premises since 1853, respondents seek to discredit them by an attack upon the supposed state of mind of the trial judge when he made the findings (Br. 79–81). It is the position of the Government that respondents' attack is improper and unwarranted.

The record in the instant case abundantly demonstrates that Judge St. Sure presided over a long and difficult trial with interest, complete fairness to both parties, and an unusual degree of patience.

Upon the conclusion of all the testimony, the case was submitted to him on elaborate briefs by both sides (R. 905). The court held the matter under advisement for more than a year and a half before rendering a decree (R. 162, 202–206). At the same time there was pending before him another cause involving a much larger tract of adjoining lands in which most of the principal issues were identical with the instant case.* Proceeding as he did with such care and caution, and fully aware of the great importance of the litigation before him, there is no basis for respondents' assertion (Br. p. 80) that "the District Judge very apparently made up his mind that the Government was right and signed the Findings presented to him without comparison with the evidence."

More specifically, the Court's attention is directed to the imputation which respondents would draw from the assertion that the Findings are "word for word" a verbatim repetition of the pleadings. Without quibbling over the matter, the correctness of this assertion may well be questioned "if this Court will compare the Findings of Fact word for word" with the pleadings as respondents suggest (Br. p. 80).

The members of this Court are thoroughly familiar with the usual practice on the submission of findings. Moreover, it is clear from an examination of the findings made that the trial judge is to be

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* *United States* v. *Stewart*, Equity 2685–S D. C. N. D. Cal.

commended for their clearness, completeness, and accuracy. With reference to Finding No. VIII in which the court found that the Government has been in possession of the premises since 1853 (R. 171), petitioner disputes the assertion that it exhibits "an incorrect allegation made in the bill of complaint" which "has crept into the findings" (Br. p. 79). The record shows that lands involved were in that year first reserved for military purposes by President Fillmore (R. 381), and this Court has held that such a reservation is "an assertion of title and possession." *United States* v. *Oregon,* 295 U. S. 1, 25.

It is therefore submitted that the findings will be accepted by this Court as conclusive unless it can be shown that they are clearly erroneous. (See cases cited at page 22, Brief for the United States.)

2. *The evidence of the Government's possession.*—In the brief for the United States the evidence showing that the United States acquired a valid prescriptive title to the lands in question is fully reviewed (pp. 23–25), and no attempt will be made either to repeat what was there said or to point out more than a few of the numerous inaccurate statements made by respondents on this point (Br. pp. 81–90).

In order to support their contention that the record does not show "any adverse possession" of the lands in suit by the United States, respondents rely (Br. pp. 85–86) upon statements made in the opinion of Mr. Justice Field in *San Francisco Sav.*

Union v. *Irwin,* 28 Fed. 708, 714, a suit involving entirely different lands. Moreover, it should be noted that in that case Mr. Justice Field held that the United States cannot acquire title by adverse possession, but that proposition was expressly overruled in *Stanley* v. *Schwalby,* 147 U. S. 508, which respondents concede to be "the leading case" (Br. p. 93) and in which Mr. Justice Field dissented.

Respondents next purport to show that private parties were in exclusive possession of the area involved here "until 1914 when, following the decision in *Sawyer* v. *Osterhaus, supra,* to the effect that respondents' predecessors had no right to bring ejectment, the Government took possession of the property" (Br. p. 86). In order that this Court may not be misled, attention is directed to the following quotation from the statement of facts given by Judge Van Fleet in *Sawyer* v. *Osterhaus,* 212 Fed. 765, 768:

> The evidence further shows that immediately upon, or soon after, its reservation as a naval station the United States government took possession of Mare Island, including the premises in dispute, established an extensive navy yard, with shops, docks, and other works connected therewith, and has maintained such possession unbrokenly down to the present time for use as a naval station, to the exclusion of all other occupancy thereof, the buildings and other main structures being maintained at the southern end of the island on the higher ground above

> referred to, while the land in dispute has been used for dumpage, storage, and like purposes, with a railway running from the main yard out to the dumps; that levees have been constructed to keep back the flow of tide waters; that the land has been partially filled in and reclaimed by dredging from Mare Island Straits; that roads are maintained thereon; that a line of dolphins on the eastern side is established for anchorage purposes in Mare Island Straits, and sentries are maintained on the land to protect the premises from intrusion and the property of the government from being stolen or carried away.

The facts here of record amply support the Government's claim of title by adverse possession. Respondents make no reference to the recent case of *United States* v. *Oregon*, 295 U. S. 1, which, like the present case, was an action to quiet title brought by the United States. There, this Court held (p. 25):

> Before Oregon was admitted to statehood, the United States is shown to have acquired title which it has never in terms conveyed away. Its possession and claim of title have ever since continued. The Executive Order setting aside the area in question as a bird reservation was an assertion of title and possession. Following the Order, as the Master found, the United States, through representatives of the Department of Agriculture, particularly a resident protector or warden, has taken active

> control of all the lands within the meander line. In the exercise of that control it has excluded hunters, erected posts marking the limits of the reservation, posted notices advising all persons of the existence of the reservation and warning them to refrain from hunting on it. This possession of the United States, under color and claim of title, is not shown to have been disputed or interfered with. As it is sufficient to preclude any action at law in the nature of ejectment, it is an adequate basis for relief in equity to remove the cloud created by the assertion of any inferior title of the State.

Paraphrasing the Court's language and applying it to the intsant case, it may be said: The United States is shown to have acquired title in 1852 (R. 295) which it never in terms conveyed away prior to the patent issued in 1928 (R. 13–16) which this action seeks to cancel (R. 17). Its possession and claim of title has ever since continued (R. 171). The Executive Order of 1853 setting aside the area in question as a navy yard (R. 169–170, 379–381) was an assertion of title and possession. Following the Order as the trial court found, the United States, through representatives of the Navy Department, particularly a resident Commandant, has taken control of all the lands of Mare Island (R. 800, 839, and 171). In the exercise of that control it has erected posts marking the limits of the reservation and advising all persons of its existence and warning them to refrain from trespassing on it (R. 580) and has erected various

types of buildings, structures, and utilities, of a value exceeding $1,250,000.00 used in the operation and activities of petitioner's naval and military forces (R. 171–172). This possession of the United States, under color and claim of title, is not shown to have been disputed or interfered with (indeed, the respondents introduced no evidence and did not controvert any of the foregoing facts). As it is sufficient to preclude any action in the nature of ejectment, it is an adequate basis for relief in equity to remove the cloud created by the patents and the Circuit Court of Appeals manifestly erred in ignoring this source of the Government's title to the lands in question.

It is therefore submitted that the Government's assertion of title acquired by adverse possession of the land prior to 1914, is not in any sense "preposterous" as respondents assert (Br. 87).

3. *The testimony of Captain Carlson.*—One of the principal witnesses at the trial for the Government was Carl A. Carlson, a Captain in the Civil Engineering Corps, United States Navy (R. 762). He testified that he had "prepared from the records a list and location plan of improvements on the land in controversy" (R. 785) and that document was received in evidence, without objection, as "Plaintiff's Exhibit GG" (R. 786). The exhibit shows, as Captain Carlson testified,

> the list of improvements, what the improvements consisted of, . . . the date built, the

approximate cost, whether or not it is still standing, and under "Remarks" whatever was necessary to make it clear (R. 786).

From this exhibit it clearly appears that the Government was in possession of the property long before 1914, having expended nearly a quarter million dollars thereon prior to that date.

Respondents now seek to impugn both the probity of Captain Carlson's testimony and the statements made in the exhibit (Br. pp. 87–89). Of course, such matters will not be considered by this Court, since neither the admissibility nor the weight to be given this evidence were in any way questioned in the trial court. It may be noted, however, that in the cross-examination of this witness, counsel for respondents stated (R. 848), "Captain, it may be interesting for you to know that I believe entirely in your competency, as well as your integrity."

It is therefore submitted that, as stated in the Government's opening brief (p. 26), the evidence establishes "that the United States acquired a valid prescriptive title under the laws of California by satisfying the requirements for such a title not only once but many times over."

4. *Government's prescriptive title unaffected by patent.*—Respondents contend, finally, that the Government's adverse possession of the lands in controversy could not begin to ripen into a valid prescriptive title until the United States has issued a patent to them (Br. pp. 93–94).

The question here involved is not the right of respondents or their predecessors to bring a possessory action, but instead the issue is whether the United States has acquired title by adverse possession. The ejectment cases relied upon by respondents are wholly inapplicable since in none of them was the right of the United States to acquire title by adverse possession involved. In *Stanley* v. *Schwalby,* 147 U. S. 508, this Court expressly held that the United States could acquire title by adverse possession despite the landowners' inability to bring a possessory action of any kind against the Government because, as the Court there held (p. 517), protest by the landowners "and application for redress in the proper quarter" would be "quite as potential" to toll the statute. In the present case the protests of respondents and their predecessors, as has been shown (Br. for the United States, pp. 28–29), were insufficient. Moreover, even assuming that a judicial remedy in the respondents is necessary before adverse possession can begin to run, they at all times had the remedy by mandamus which they finally invoked (Br. for the United States, pp. 27–28).

Little remains that requires answer. Respondents' repeated claim that they and their predecessors have been continuously and vigorously fighting for their lands and protesting against the occupancy by the Government has been shown to be

without merit (Brief for the United States, pp. 28–29). It is therefore submitted that respondents have failed utterly to advance any reason to justify this Court in disturbing the findings of the trial court that the United States has acquired a valid fee title to the lands in question by reason of its long continued and adverse possession of them.

IV

APPLICATION OF SWAMP ACT TO THE LANDS IN CONTROVERSY

With respect to the remaining principle issue raised by the United States—the application of the Swamp Act to lands claimed under a Mexican grant—respondents indicate that this is an "additional" contention not raised below (Br., p. 30). However, it is pleaded by the government (R. 14), found in favor of the United States by the trial court (R. 174), assigned as error by respondents in their appeal to the Circuit Court of Appeals (R. 913, 922–923), and the court below devoted five pages (R. 1004–1009) to the question. Respondents' brief (pp. 73–79) raises no questions of law not discussed in the brief for the United States.

It is respectfully submitted that the decree be reversed and the cause be remanded to the Circuit

Court of Appeals with directions to affirm the decree of the trial court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

UNITED STATES OF AMERICA,
Petitioner,
v.
JAMES E. O'DONNELL, ET AL.
No. 487.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINIONS BELOW.

No opinion was delivered by the District Court. The opinion of the Circuit Court of Appeals (R. 967) is reported in 91 F. (2d) 14.

JURISDICTION.

The decree of the Circuit Court of Appeals sought to be reviewed was entered on October 22, 1936 (R. 1034). On November 19, 1936, petitioner filed a petition for rehearing, which was denied on June 7, 1937 (R. 1035). On August 19,

1937, an order was granted, extending the time for filing a petition for certiorari to and including October 7, 1937 (R. 1035). The petition for certiorari was filed on October 7, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. The question upon which the Court below decided the case may be stated as follows: Respondents hold title to certain land under a patent from the United States, issued pursuant to the Swamp Land Act of 1850. The United States asserts an adverse title by purchase in 1853 of a Mexican claim to the land. Confirmation of the claim was secured in a proceeding before the Board of Land Commissioners and the District Court. Because of its previous purchase of the Mexican claim, the United States was the real party in interest in the proceeding against itself to establish the claim. Respondents were not parties thereto. Is the decree in the confirmation proceeding conclusive as to the validity of the Mexican claim and the title of the United States under it in an action by the United States against respondents to cancel respondents' patents and to quiet title in the United States?

2. Was the tract of swamp land, here in controversy, a part of "Mare Island" so as to be within the purported grant by the Mexican Government later purchased by the United States? (The Court below did not reach this question since it held that the United States had not established title as against respondents even if the Mexican grant did include the swamp lands.)

3. Did the United States acquire title to this land by adverse possession? (This is a new question raised by petitioner not considered by the Court below.)

4. A number of other questions were raised in the District Court and on appeal to the Circuit Court of Appeals, but

the Circuit Court of Appeals found it unnecessary to consider them and, for the sake of brevity, they will not be restated here.

STATEMENT.

This proceeding was brought by the United States in equity to quiet title in itself to certain swamp lands, now reclaimed, which adjoined Mare Island, in San Francisco Bay. The bill of complaint (R. 2-43), as amended (R. 128-129), asks cancellation of a patent to the land issued by the United States to the State of California and of a patent issued by California to one Darlington. These patents are now vested in respondents through mesne conveyances. The answers (R. 45-98), as amended (R. 100-126), denied the validity of the adverse title claimed by the United States and asserted the validity of the patents and conveyances giving title to respondents.

The patents, sought to be cancelled, were issued pursuant to the Swamp Land Act of September 28, 1850, c. 84, 9 Stat. 519. That Act granted to the states then in existence, of which California was one, all of the swamp lands within their borders which were unsold on the date of the passage of the Act. California thereafter enacted provisions for the survey and sale of the swamp lands (Act of April 28, 1855, Cal. Stat. 1855, p. 189) under which the tract here in controversy was surveyed in 1856 (R. 172) and purchased by Darlington, the patent of California issuing on March 18, 1857 (R. 30-33). Thereafter, as required by a writ of peremptory mandamus issued in the Supreme Court of the District of Columbia (*Work* v. *U. S. ex rel O'Donnell*, 23 F. (2d) 136, Ct. App. D. C.), the patent of the United States to this tract was issued to California (R. 33-35).

The United States claims an adverse title in itself to this tract of swamp land and asserts that the patents now held by respondents are void and of no effect by reason of an alleged Mexican grant (Ex. A to the bill, R. 19) purporting to convey the island "La Yegua" (Mare Island) to one Don

Victor Castro. Through mesne conveyances this alleged grant passed to certain persons named Bissell and Aspinwall, who, pursuant to the Act of Congress of March 3, 1851, 9 Stat. 631, setting up a Board of Land Commissioners for the determination of claimed Mexican titles, filed on August 31, 1852, their petition before the Board, praying confirmation of their title (R. 220-222).

On December 18, 1852, before any steps had been taken in the Board proceeding (R. 218), the United States purchased from Bissell and Aspinwall their claim to the island, receiving a quitclaim deed and bond for title (R. 302-312), Thereafter the Board proceeding was continued, the United States appearing in opposition to the claim and also being the real party in interest in support of the claim. On May 8, 1855, the Board entered its decree confirming the claim (R. 279-280). An appeal was taken to the United States District Court for the Northern District of California (R. 280-284). In the files of that Court in that case is found an unsigned and undated decree affirming the decision of the Board (R. 285-286). This decree carries no endorsement as having been filed. Also there is found with an endorsement "filed April 1, 1857" an order granting an appeal to this court (R. 287). Also there is found reference to a notice by the Attorney General that the appeal would not be prosecuted and to a stipulation to that effect by the District Attorney (R. 286, 288). Also there is found an unsigned and undated order, made on motion of the District Attorney, that the appeal be vacated and that the claimants have leave to proceed under the decree of the court (R. 286-287). The proceeding remained in this state until 1930 when steps were taken which will be hereafter set out.

Meanwhile, on April 9, 1853, after the purchase by the United States of the Castro claim and during the pendency of the Board proceedings, Attorney General Caleb Cushing was asked for his opinion as to the title of the United States to Mare Island. Approval by the Attorney General of the title was required by the Act of March 3, 1853 (10 Stat. 223),

before construction could be commenced on the Naval Yard which was planned for that site. His opinion (8 Op. A. G. 422) stated that he believed California to have a valid claim as against the United States to all of the swamp and overflowed land connected with the Island and suggested that California be invited to relinquish to the United States her claim to the shores and overflowed land of the Island. By Act of May 11, 1854 (Cal. Stat. 1854, p. 48), California granted to the United States the title and interest of the state in the overflowed beach or swamp lands on the eastern shore of the Island from the southern point of the Island to a parallel intersecting the northern point of the highlands of the Island. This did not include the swamp lands here in controversy since they lie entirely to the north of the most northerly point of the highlands.

The United States thereafter proceeded to build a Naval Yard on the Island utilizing also the swamp and overflowed land granted by California. However, the swamp land north of the Island which is here in controversy was not used at that time except for such temporary things as an artillery target and a road along the sand ridge of the beach. Plaintiff's Exhibit GG (original). That Exhibit lists the steam engineering building constructed in 1858 as being partly on the swamp land here in controversy. But this is incorrect as may be seen by an inspection of the drawing which is a part of that Exhibit. The engineering building was partly on the upland and partly on the swamp lands to the east of the Island granted to the United States by the State of California. In 1873 a small house was constructed on the land. This immediately drew protest from respondents' predecessors as is set out below. The land was still in its natural swampy state when examined by Freeman in 1877, the buildings being on the highlands (R. 580). It continued to be overflowed by tides after the date of the construction of the engineering building (R. 600) and at least as late as 1873 and 1874 (R. 624). After the decision in *Sawyer* v. *Osterhaus*, 212 Fed. 765, in 1914, the

Commissioner of the General Land Office advised the United States to take possession without delay (R. 546) and this was done, the United States erecting a fence to the north of the tract (R. 623, 786). Nevertheless, even by 1917 the filling in of the land had not progressed far (R. 806) and the first permanent buildings were not put upon the land until 1918. Plaintiff's Exhibit GG (original).

Meanwhile respondents' predecessors were actively asserting their rights in the property. In 1873 a report of the Board of Civil Engineers to the Secretary of the Navy stated that certain parties claimed ownership of this swamp land by virtue of the swamp land patent from the State of California (R. 488). The Federal authorities had been admonished not to take sand from this land (R. 783). Formal protests were filed with the Surveyor General and with the Commissioner of the General Land Office in 1879 by the Attorney for respondents' predecessors (R. 583-593). By 1905 proceedings were pending in court (R. 535). These proceedings finally terminated in 1914 (*Sawyer* v. *Osterhaus, supra*) with the holding that without legal title the plaintiffs could not maintain the action of ejectment. Thereafter steps were taken in the Land Department to secure a patent, but without success. A mandamus proceeding was then brought against the Secretary of the Interior in the Supreme Court of the District of Columbia in which that Court issued a writ of mandamus requiring the Secretary to determine whether the lands were swampy in character at the date of the Swamp Land Act of 1850. On January 10, 1925, the Secretary decided that they were swamp lands on that date. Respondents then brought another mandamus proceeding against the same officer in the same Court, wherein, after an appeal to the Court of Appeals of the District of Columbia (*Work* v. *United States*, 23 F. (2d) 136) a writ of mandamus issued requiring the Secretary to certify the lands for patent to the State of California. Pursuant to this writ, the patent was issued.

Thereafter the United States Attorney for the Northern District of California appeared in the District Court in the Land Commission confirmation proceeding brought by Bissell and Aspinwall which had been dormant since the unsigned decree and other matters in 1857 heretofore referred to. On motion of the United States Attorney, the District Court on April 15, 1930, entered a decree *nunc pro tunc* affirming the decision of the Board of Land Commissioners (R. 289-291). The District Court was then, for the first time, advised that the United States had purchased the claim sought to be confirmed.

A few months after this *nunc pro tunc* decree, the present proceeding was instituted. After trial on the merits, the District Court entered its decree to the effect that the United States is the absolute owner of the property, that respondents have no right, title or interest in the lands, and ordered the patents and conveyances held by respondents to be delivered up for cancellation, quieting title in the United States (R. 202-206). On appeal, the Circuit Court of Appeals reversed, the majority holding that the decree in the confirmation proceeding was not conclusive, as against respondents, on the question of the validity of the Mexican claim and the validity of the title of the United States thereunder, and that since the United States had not otherwise proved a paramount title in itself, it was not entitled to the relief sought.

ARGUMENT.

1. It is not disputed by the United States that the Mexican grant under which it asserts title is, in fact, fraudulent. Indeed, in *Bouldin* v. *Phelps*, 30 Fed. 547, officers of the Department of Justice, representing not only the defendant there (the Commandant of the Mare Island Naval Yard) but also the United States (see Opinion, p. 549), asserted and successfully proved the fraudulent character of this same grant. For this reason, probably, the United States does not urge in its petition for certiorari here that it has

proved in this case a valid and paramount title in itself to the land in controversy independently of the asserted binding and conclusive effect of the decree in the Land Commission proceedings purporting to confirm the Mexican grant. The case for the United States thus rests upon the question of whether the Land Commission proceedings are conclusive against respondents on the validity of the grant and the adverse title of the United States thereunder.

The Court below held that respondents were not concluded by the Land Commission proceedings. In so holding, the Court was, we submit, clearly right under principles fully settled by this Court.

The equitable rights to the patent now held by respondents were vested in respondents' predecessor, the State of California, before the commencement of the Land Commission proceedings. The Swamp Land Act of 1850 was a grant *in praesenti* to the states of the unsold swamp lands within their borders. *Wright* v. *Roseberry*, 121 U. S. 488, 509; *Tubbs* v. *Wilhoit*, 138 U. S. 134; *Rogers Locomotive Works* v. *Emigrant Co.*, 164 U. S. 559, 570; *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 591; *Work* v. *Louisiana*, 269 U. S. 250. The equitable rights which immediately passed under this Act amounted to an inchoate title, even though the particular lands involved had not yet been surveyed and ascertained to be swampy and overflowed. *Rogers Locomotive Works* v. *Emigrant Co., supra*, p. 570; *United States* v. *Minnesota*, 270 U. S. 181. This inchoate title the United States thereafter had no power arbitrarily to destroy (*Michigan Land & Lumber Co.* v. *Rust, supra*, p. 593) and subsequent action by the United States such as the reservation of the land or the issuance of a public land patent to the land would be ineffective. *Work* v. *Louisiana, supra; Tubbs* v. *Wilhoit, supra.*

At the time of the Land Commission proceedings, therefore, California had a definite interest in the land and a definite interest in defeating the Mexican claim. In appearing in opposition to the claim in those proceedings, the

United States was, in reality, representing the interests of California since that State was entitled to the land if the Mexican claimants were not successful. In fact, if respondents were now to be held concluded by the Land Commission decree, they would be concluded because they and their predecessor, the State of California, were represented by the United States in the proceedings. *Beard* v. *Federy*, 3 Wall. 478.

Before any steps had been taken in the Land Commission proceedings, however, the United States acquired the interest of the Mexican claimants. This interest was, of course, adverse to the interests of California. The United States was then in the position of being the real party in interest in support of the Mexican claim and being the representative of California against the claim. In this situation, the case went to decree before the Land Commission and later before the District Court, the United States, in its role of opponent to the claim, dismissing its appeal to this court.

The question here, then, is whether the United States may plead the Land Commission proceedings as conclusive on respondents upon the basis that California, respondents' predecessor, was represented by the United States in the proceedings when, in fact, the United States had an interest in those proceedings adverse to the interest of California. We submit that the answer to this question has already been given by the decisions of this Court. That answer is that respondents are not concluded by the proceedings.

The Court below so held on the ground that the United States had violated a trust relationship between itself and California. In this, the Court was clearly correct. Where inchoate rights to public land have been found to be vested under Acts of Congress, this Court has uniformly decided that the title to the land was held by the United States in trust for the possessor of the rights. See, for example, *Orchard* v. *Alexander*, 157 U. S. 372, 383; *Knapp* v. *Alex-*

ander Co., 237 U. S. 162; *United States* v. *Anderson*, 194 U. S. 394; *Payne* v. *New Mexico*, 255 U. S. 367, 371; *Cornelius* v. *Kessel*, 128 U. S. 456, 460-1; *Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428, 432. A similar decision has resulted even where the inchoate rights were received through a gift from the United States rather than a sale (*United States* v. *Anderson, supra*) and this rule is applicable to the inchoate rights received by the states under the Swamp Land Act (*Brown* v. *Hitchcock*, 173 U. S. 473, 476; *Michigan Land & Lumber Co.* v. *Rust, supra*).

Under the rule of these cases the United States, at the time of the Land Commission proceedings, held the legal title to the land here in controversy in trust for the State of California. The United States, being such a trustee, could not, in equity, advance its own interests to the prejudice of the rights of the State by purchasing an adverse interest in the property and establishing that interest by litigation against itself as representative of the equitable interests of California. A trustee is not permitted to acquire a dominant interest or otherwise make profit out of dealings with trust property without the express consent of the cestui. *Chicago etc. Railroad* v. *Des Moines etc. Railroad*, 254 U. S. 196, 220. In its petition, the United States seems to contend that before respondents may take advantage of this rule they must plead and prove actual fraud in not properly contesting the claim before the Board of Land Commissioners. But the disability of a trustee to acquire and perfect a personal interest in the subject matter of the trust is not dependent upon proof of actual fraud but is an absolute disability arising out of the high degree of duty and loyalty required of trustees by courts of equity. Bogert, Trusts and Trustees, Vol. 3, secs. 485, 543.

Moreover, even if the United States were not to be held a trustee for California at the time of the Land Commission proceedings, still, we submit, respondents would not be bound by the confirmation decree. By reason of being a privy, California would normally be impliedly represented

by the United States in the proceeding. But when it appears that the United States had an adverse interest in the proceeding it no longer may be assumed that California was properly represented and, certainly as between the United States and California, the decree cannot operate to conclude California's rights.

Situations similar to that presented here involving judicial proceedings where one party was interested in both sides have been considered by this court before and the court has refused to recognize them as conclusive on innocent parties. *Lord* v. *Veazie,* 49 U. S. 251; *United States* v. *Throckmorton,* 98 U. S. 61, 65, 69; *Calhoun* v. *Millard,* 121 N. Y. 69, 76 (followed in *Andes* v. *Ely,* 158 U. S. 312, 317-318); c. f. *Michaels* v. *Post,* 21 Wall. 398. The decisions in those cases were sometimes put on the ground of collusion and sometimes on the lack of an adversary trial. Whatever the ground used, the result is required by the principles of fairness and equity to prevent any possibility of a person's rights being destroyed because the one supposedly representing him had, in fact, an adverse interest in the proceedings.

Petitioners contend that by the Act of May 11, 1854, Cal. Stat. 1854-1855, c. 43, p. 48, California consented to the purchase of the Bissell and Aspinwall claim. That Act was a consent statute under Art. 1, sec. 8, cl. 17 of the Constitution and was also a grant of certain lands to the United States. The Act, however, carefully excluded the land here in controversy and certainly cannot have any force or effect in connection with property to which it did not relate.

Petitioners further assert that the Court below determined the case against them on a new theory not raised in the District Court and not covered by an assignment of error. On the contrary, however, the basis of the decision below was that the United States could not establish its title as against respondents by the decree in the confirmation proceedings because of the fact that it held rights adverse to the interest of California in those proceedings. Respond-

ents repeatedly raised this issue in various ways in the District Court. See motion to exclude the transcript of the confirmation proceedings (R. 131-133); Paragraphs VI, VIII and XIII of the motion to dismiss bill under reserved objections (R. 141-153). See also the following paragraphs of the findings of fact of the District Court which indicate the contentions made by respondents: Paragraph XVI, R. 177-178, Paragraph XXVI, R. 183, Paragraph XXVIII, R. 184-185. Also the same issue was raised by the assignment of errors on appeal to the court below. See Paragraph VI, R. 911; Paragraph XVII, R. 916; Paragraph XXXII, R. 921; Paragraph XXXVI, R. 922-923; Paragraph XXXVII, R. 923; Paragraph XXXVIII, R. 923-924, and Paragraph XXXIX, R. 924. All of the facts establishing this issue, including the fact that the United States had purchased the interest of Bissell and Aspinwall and had carried on the confirmation proceedings thereafter, are clearly shown in the record.

The decision of the court below that respondents are not concluded by the decree in the Land Commission proceedings is, we submit, clearly correct and entirely in accord with fundamental principles of equity and good conscience.

2. Petitioner seeks to invoke the doctrine of laches. However, the record shows, as heretofore summarized in the statement, *supra,* pp. 5-6, that respondents' predecessors immediately protested when the first temporary building was put on the property in 1873 and that they have actively and continuously asserted their rights ever since, while, on the other hand, unequivocable possession was not taken by the United States until 1914 and no permanent improvements were put on the property until 1918. Laches cannot be imputed to respondents on those facts.

3. Petitioner also raises an issue not even considered by the court below, that of adverse possession. It is true that the District Court found that the United States had occupied the tract since 1853. However, this is a proceeding in equity and the court will consider the evidence as in a trial

de novo. When the evidence is considered, it is clear that possession of the lands was not taken by the United States until the erection of a fence in 1914. Prior thereto the United States had placed on the land only temporary improvements. Plaintiff's Exhibit GG (original). Certainly temporary acts of the nature of those listed in that Exhibit are insufficient upon which to base title by adverse possession. See the decision of Mr. Justice Field in *San Francisco Savings Union et al.* v. *Irwin,* 28 Fed. 708, affirmed, 136 U. S. 578, involving other swamp lands alleged to belong to Mare Island. But the fatal objection to the contention that the United States received title by adverse possession is to be found in the constant effort of respondents and their predecessors, beginning when the United States first constructed a temporary building on the land and extending over a period of more than fifty years, to enforce their rights to this property (see statement, supra, p. 6). Under the decision in *Sawyer* v. *Osterhaus, supra,* respondents had no available remedy by which to assert their rights until they secured a patent to the land in 1928. In such a case, even a protest to the Government officers would be sufficient to prevent adverse possession by the Government. *Stanley* v. *Schwalby,* 147 U. S. 508. In view of the long course of the controversy here, it cannot be said that a presumption of abandonment by respondents of their rights can have arisen.

4. No important point of law of general application is involved in this case. The suit is a local proceeding to quiet title to a particular tract of land and the decision in it is and must be based on the peculiar facts of this case. In effect, the court below held that petitioner did not sustain the burden of proof requisite in a case of this sort. We are unable to see any basis for the assertion of petitioner (pet. 34) that the decision below creates wholesale uncertainty with respect to California land titles. The decision could have no application to any case where there did not exist the same unusual factual situation that is present here.

One other case involving additional swamp lands adjoining Mare Island is now pending in the District Court for the Northern District of California and presents similar questions. But except for that case, it would seem to us to be extremely unlikely that a case would again arise where the United States asserted title under a fraudulent Mexican grant, confirmed after purchase by the United States, to property which has passed to a state under a prior grant *in praesenti*.

5. Nor has this case otherwise an importance that would warrant a review by this court of the correct decision below. As is stated in the petition (p. 2), the tract here in controversy comprises only an insignificant part of the property connected with the Mare Island Naval Base. The Naval Yard itself is upon Mare Island proper, which consists of highlands, and the title of the United States to those lands is not subject to attack. The petition states, without authority in the record, that the loss of these lands will impair the utility of the entire Base. We cannot believe this to be true since the Base was used for sixty years or more without the use of these lands. If it is true, however, petitioner has, of course, complete protection in its power of eminent domain.

Petitioner asserts, referring to a statement in the dissenting opinion below, that the United States has spent $2,000,000.00 developing these lands as an integral part of the Naval Base. The value of the improvements on the land was put in the findings of the District Court at $1,250,000.00 (R. 172). Nevertheless, whatever has been spent on the land, it clearly appears that permanent expenditures were not made until 1918 and that all expenditures were made with full knowledge of respondent's rights which were at all times being actively asserted. Certainly expenditures so made cannot give to petitioner rights which it otherwise would not possess.

CONCLUSION.

The decision below was correct. The principles of law involved are not of general importance and have been already settled by this court. The petition should, therefore, be denied.

Respectfully submitted,

WILLIAM STANLEY.

JAMES E. KELBY,
GORDON LAWSON,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 487.

UNITED STATES OF AMERICA, PETITIONER,

v.

JAMES E. O'DONNELL, ET AL.

BRIEF FOR RESPONDENTS.

WILLIAM STANLEY,
Attorney for Respondent.

JAMES E. KELBY,
GORDON LAWSON,
Of Counsel.

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v.

JAMES E. O'DONNELL, ET AL.

BRIEF FOR RESPONDENTS.

OPINIONS BELOW.

No opinion was delivered by the District Court. The opinion of the Circuit Court of Appeals (R. 967) is reported in 91 F. (2d) 14.

JURISDICTION.

The decree of the Circuit Court of Appeals sought to be reviewed was entered on October 22, 1936. (R. 1034.) On November 19, 1936, petitioner filed a petition for rehearing, which was denied on June 7, 1937. (R. 1035.) On August 19, 1937, an order was granted,

extending the time for filing a petition for certiorari to and including October 7, 1937. (R. 1035.) The petition for a writ of certiorari was filed on October 7, 1937, and was granted on November 8, 1937. (R. 1037.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Does the title asserted by the United States under a purported Mexican grant extend to the land in controversy?

2. Assuming that the title asserted by the United States extends to the land in controversy, is that title established as against Respondents by confirmation proceedings wherein the United States was defendant and as such supposedly representing Respondents, but wherein the United States actually had, and actively asserted, interests adverse to Respondents, in that while the proceedings were pending, the United States purchased the claim from the plaintiffs and upon its own motion secured a *nunc pro tunc* decree in favor of the claim by representing to the court that since the United States owned the claim, the United States as defendant had no objection to a decree for the plaintiffs confirming the claims?

3. Was the Swamp Land Act of 1850 applicable to the land in controversy?

4. Has the United States acquired title to the property in dispute as against respondents by adverse possession?

STATUTES INVOLVED.

The statutes involved are set forth in the appendix *infra*, pp. 96-109.

STATEMENT.

This proceeding was brought by the United States, in equity, to cancel patents held by Respondents to certain swamp lands in San Francisco Bay and to quiet title in the United States to those lands. The Bill of Complaint (R. 2-4) as amended (R. 128-129) asks cancellation of a patent to the land issued by the United States to the State of California and of a patent to the land issued by the State of California to one Darlington. The rights under these patents are now vested in Respondents through mesne conveyances. The answers (R. 45-98) as amended (R. 100-126) assert the validity of the patents and conveyances vesting title in Respondents, deny the validity of the adverse title claimed by the United States and ask that the Respondents' title be quieted as against the United States and that the Court decree that the Respondents are entitled to the possession of the premises and that Respondents be placed in possession thereof.

After a trial on the merits, the District Court entered its decree to the effect that the United States is the absolute owner of the property and that the Respondents have no right, title or interest thereto, and further ordered that the patents and conveyances held by Respondents be delivered up for cancellation, quieting title in the United States. (R. 202-206.) The Circuit Court of Appeals reversed the District Court, the majority holding that the United States had not proved title in itself as against Respondents. (R. 967-1009.)

The facts as shown by the record and by matters of which the Court takes judicial notice are as follows:

Mare Island is a hilly stretch of land in San Francisco Bay, about 2 or 2½ miles long and containing approximately 900 acres, bounded on the West by San Pablo Bay, on the East by Napa Creek and on the South by the Straits of Carquinez. (R. 237-238, 357.) On the North the Island is adjoined by a very narrow strip of wet swamp land from which swamp lands gradually extend out fan-wise for many miles to the Northwest. The tract here in controversy, known as California State Segregation survey "34", is the narrow neck of swamp land extending a short way into the fan-wise extension. The swamp lands adjoining Survey "34" to the north are known as California State Segregation survey "569."

The swamp lands in Survey "34" were, in the period of 1840-1860, at about the elevation of the mean high water, it being a disputed point between the parties to this proceeding as to whether, on the evidence in the record, that part of Survey "34" which adjoined Mare Island was slightly below or slightly above that mark. (R. 600, 815.) Even the Government's evidence, however, shows that all of Survey "34" was overflowed by the tides several times a month (R. 803-805, 815) and was clearly below the line of highest regular high tide (R. 622-627; Plaintiff's Ex. KK, original).[1] The line at the North end of Mare

[1] Upon stipulation, the District Court ordered a large number of original exhibits in the case to be sent to the Circuit Court of Appeals as part of the record. These exhibits are now before this Court and whenever reference is made to one of them in this brief the word "original" will be used unless the exhibit is also printed in the record when only the record citation will be given.

Island where the upland stopped and swamp land tract "34" began was marked by a bank which was the point of highest regular high tide. (R. 790, 792.)

In the spring of 1852 the Secretary of the Navy appointed the Sloat Board to select a site for a Navy Yard in California. (R. 337.) This Board arrived at San Francisco on April 28, 1852, and after an examination came to the opinion that Mare Island presented the most favorable location. On June 24, 1852, the Board wrote to the United States District Attorney at San Francisco asking him to investigate the title to Mare Island. (R. 365.) The United States Attorney found that a Captain G. W. P. Bissell, one W. H. Aspinwall, and the heirs of a Lieutenant McArthur (apparently the naval officer who first made soundings indicating the advantages of Mare Island (see R. 316-318, 333)) claimed title to the island by a conveyance from one Victor Castro who purported to be a Mexican grantee of the Island. (R. 363.) Negotiations were opened looking to a purchase of their claim. (R. 368-372.)

On August 31, 1852, a petition was filed before the Board of Land Commissioners by Bissell and Aspinwall in which they asked that title be confirmed in them to Mare Island under the asserted Mexican grant to Castro. (R. 220-222.)

On November 6, 1852, the Sloat Board transmitted to the Secretary of the Navy its report in which Mare Island was recommended for the naval base. (R. 338-365.) The report states that Mare Island is North of the entrance to the Straits of Carquinez and is bounded on the East by Mare Island Straits, on the West by the

Bay of San Pablo, and on the North by a large tract of tule land extending several miles in the direction of the Valley of Sonoma. (R. 351.) The report further states that the surface of the Island at the South end is broken and elevated, some of the hills rising to the height of 280 feet, but at the North end it is more uniform and may be easily reduced to a convenient grade. *Ibid.* The report further states that Mare Island contains, including a strip of tule on the East side of the Island opposite Vallejo, about 900 acres, all of which it is desirable that the Government should possess, and that the whole length of the Island is a distance of about two miles. (R. 357.) Reference was made to the claim of Bissell and others to the Island under the Castro grant, the Board expressing considerable doubt as to the validity of this grant. (R. 362-364.) Furthermore the Board stated that possession of the Island was held by squatters. (R. 364.) Accompanying this report was a plan of Mare Island which the Board describes as a careful survey of the Island and the Straits. (R. 351.) The Island as shown on this plan consisted only of highlands and did not include any of the swamp lands lying to the north. (R. 842-843.)

Following receipt of the Sloat Board report the Secretary of the Navy conducted negotiations with Bissell and Aspinwall, resulting in a letter from the Secretary of the Navy to the agent of the asserted owners of the Island, dated December 10, 1852, in which the Secretary of the Navy offered to purchase the Island for a cash consideration of whatever portion of an appropriation of $100,000. might remain after all the expenses

of the Sloat Board had been paid. This offer was accepted on December 12, 1852. (R. 312-316.) Meanwhile on December 13, 1852 the Secretary of the Navy had asked the Sloat Board to estimate the value of Mare Island. On the same date the Board responded that the Island, including the tule opposite Vallejo, contained about 900 acres in addition to a large tract of tule extending toward Napa and Sonoma. The Board stated that three-fourths of the Island was recently purchased for a much less sum, but estimated the value at $100,000. (R. 324-326.)

On January 4, 1853, Bissell, Aspinwall and Mary C. McArthur gave their quit claim deed to the United States of all the tract of land and island called and known as Mare Island in the Bay of San Pablo, as recently surveyed by the Board of Officers of the United States sent to California for the selection of a site for the Navy Yard there, including all the tule or low land and marsh belonging to the same, or which has ever been reputed or claimed to belong to the same, and all waters, harbors, bays, creeks, and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging. (R. 302-308.) The survey of the Board of Officers which is referred to as indicating what was conveyed, is the Sloat Board plan which, as we have pointed out, shows the Island as containing only highlands. (R. 842-843.)

On February 9, 1853 the Secretary of the Navy wrote to the President stating that he had it in contemplation to select Mare Island as the site for a Navy Yard and that negotiations had been in progress for the purchase of the island and its appendages. He further stated

that an investigation of the title offered to the United States by those claiming to own the Island had led to some doubt whether the Government did not already possess the paramount right to its occupancy and use. He suggested that it would be proper for the Government to reserve the land for public use and thus assert a title which would at least serve to strengthen any other which might ultimately be purchased. President Fillmore on February 11, 1853 ordered the reservation to be made. (R. 379-383.)

On February 28, 1853, Aspinwall and one Comstock entered into a bond in favor of the United States in the sum of $200,000. conditioned on the indemnifying and saving harmless of the United States against any claim or title to the tract called Mare Island and its appurtenances which might be set up by or through any person or persons claiming under Victor Castro and his assigns, or others represented by Aspinwall and against any adverse claim or title in any other person or persons or body politic which within two years from the date of the bond might be made and thereafter successfully established. (R. 308-312.)

On April 9, 1853, the Secretary of the Navy wrote to Attorney General Cushing asking his opinion as to the title of the Government to Mare Island. The Attorney General's opinion approving title was required by the Appropriation Act as a prerequisite to the expenditure of money on construction of the Navy Yard. The Attorney General's opinion (8 Op. A. G. 422) was that the State of California could set up and probably maintain, as against the title of the United States received under the Castro grant, title to so much of Mare

Island as was subject to overflow by water periodically or otherwise. This applied, the Attorney General held, both to the shores which had been received by the United States from Mexico in trust for the State and to the swamp lands which had been granted by Congress to the State by the Act of 1850. The Attorney General recommended as indispensible prerequisites to any lawful expenditure of public money on Mare Island that an investigation be had into adverse claims to the Island and that the State of California be asked to relinquish its title to the swamp and overflowed lands on the Island.

Following the receipt of this opinion the Secretary of the Navy, on October 3, 1853, wrote to the Governor of California enclosing a copy of Cushing's opinion and asking the Governor to invite the attention of the Legislature to the subject in order that proper acts might be passed ceding the jurisdiction and relinquishing the title of California to Mare Island. (Calif. Senate Journal, 1854 p. 37 and App.) In response to this letter there was passed on May 11, 1854, an act giving the consent of the State to the purchase of Mare Island, and transferring to the United States the title and interest of the State in such portions of Mare Island as were overflowed, beach, or swamp lands on the eastern shore of the Island, "from the Southern point thereof to a parallel intersecting the northern point of the highlands". (Calif. Stat. 1854-1855, C. 43, pp. 48-49, App. *infra,* pp. 105-107)

On September 16, 1854, Commander Farragut took possession of the Island and warned off all the squatters. (R. 769.) On November 16, 1854, Hans Patton,

County Surveyor of Solano County, surveyed a part of the swamp land north of Mare Island, including what is now known as Survey "34", for one Josiah Hanscom who held some school land warrants. (R. 758-759.) This survey stated that it began at the point at the northern end of Mare Island where the hill land stops and the tule sets in on the shore of San Pablo Bay.

On May 8, 1855 the Board of Land Commissioners filed an opinion and decree confirming the Castro grant which had been purchased by the United States. (R. 279-280.) The evidence on behalf of the claimants was to the effect that on or about October 30, 1840 one Jose Victor Castro petitioned the Government of the Department of Californias for a grant of an adjacent island in the Bay of San Francisco, called Mare Island, as a place for putting his stock to protect it from the Indians. (R. 248.) Castro was on October 31, 1840 given a provisional permit to occupy the Island while the usual steps of investigation were being taken. (R. 250.) On the back of this provisional permit as introduced in the Land Commission proceeding was a hand written grant of the Island by Governor Alvarado bearing the date May 20, 1841. (R. 250-251.) The Archives of the Mexican Government contain no record of this hand written grant. (R. 247-250.) One of the principal witnesses for the claimant and the witness who was most familiar with the land claimed was Mariano G. Vallejo. He testified that Mare Island was some 2½ miles in length and contained about ½ league of land, a little more or less. (R. 237-238.) Although there was strong evidence that the hand written grant

was not executed until after the United States took possession of California, nevertheless the Board confirmed the grant on the ground that it did not feel warranted in discrediting entirely the testimony of Governor Alvarado who testified in favor of the grant, and that if any force was to be given to the Alvarado testimony it would have to be for the full extent of his statements. (R. 277-279.)

On June 11, 1855, County Surveyor Patton surveyed the tract herein in controversy for David N. Darlington, Respondents' predecessor. (R. 591-592½.)

On October 20, 1855 a transcript of the Land Commission proceedings was filed in the District Court. (R. 280.)

On October 10, 1856, David P. Wade, County Surveyor of Solano County officially surveyed the tract in controversy under the California Statute with regard to the sale of swamp lands granted by the Swamp Land Act of 1850. This survey is Survey "34". (R. 383-388.)

Sometime prior to March 1857, Counsel for the claimants under the Castro grant, who were appellees on the appeal to the District Court, filed a paper in the District Court entitled "Index of Case". The paper contained the following heading, "Claim of G. W. P. Bissell and William H. Aspinwall to Mare Island, about ½ a league, in Sonoma County". This index of the case also summarized the deposition of Vallejo to the effect that Mare Island contained about ½ a league, a little more or less. At the end of this document was the following statement (Pltff. Ex. C, Original):

> The United States being now the owner of the titles of appellees, a confirmation of this claim inures to the benefit of the Government and no objection is therefore made to a decree in favor of the validity of the claim.

On March 2, 1857 there was entered on the register of the United States District Court in the confirmation proceedings a notation "filed decree of confirmation". (R. 566.) Also on the minutes of the Court for March 2, 1857 an entry appears enumerating a number of cases among which is the case of *United States* v. *Bissell and Aspinwall* to which the following minute is appended, "Decree of confirmation was entered in each of these cases by consent of the United States District Attorney". (R. 567.) However, after due and diligent search the Clerk of the Court in 1879 was unable to find any decree of confirmation on file or of record in the case. (R. 567.) There was, however, in the jacket for the case a form of a decree which had been drafted but which had never been signed or entered in any way. (R. 285-286.) Also in the jacket is an order by the Court dated April 1, 1857 that an appeal be granted in behalf of the United States to the Supreme Court. This order is endorsed "filed April 1, 1857", but is unsigned. (R. 287.) Also in the jacket is a statement signed by the Attorneys for appellees but undated to the effect that in pursuance of notice from the Attorney General it is stipulated that the appeal to the Supreme Court heretofore granted be vacated and that claimants have leave to proceed under the decree of the Court heretofore rendered as under a final decree. (R. 288.) Also in the jacket is a form of an order unsigned

and undated to the effect that on motion of the District Attorney it is ordered that the appeal theretofore granted be vacated and the claimants have leave to proceed under the decree of the Court as under a final decree. (R. 286-287.) No entry appears in the Registry of the Court with regard to the filing of any decree dismissing an appeal. (R. 566.)

On March 18, 1857 the State of California issued a patent to Survey "34", to one Darlington. The patent recited that it was made under the Swamp Land Act of 1850 and the California Act of 1855 providing for the sale of swamp and overflowed lands. (R. 30-33, 388.) This is the patent from the State which Respondents now hold and claim under and is one of the patents which the United States seeks to cancel by this proceeding.

On September 17, 1873 the Chief of the Bureau of Yards and Docks, Navy Department, appointed a Board of Engineers to present a plan for the development of the Mare Island Navy Yard. (R. 483-485.) At the same time Commandant John Rogers, in charge of the Navy Yard at Mare Island, was notified of the appointment of this Board and that they would soon arrive at Mare Island. (R. 482.) On September 26, 1873 Commandant Rogers wrote to the Chief of the Bureau of Yards and Docks, Navy Department, stating that the tule land extending towards Napa and Sonoma was valuable to the Government, but that he had been admonished not to take sand at a distance of 50 feet from the foundery. The foundery, erected in 1858, was on the uplands of the Island right next to the point where the upland stopped and the tule lands comprised in

Survey "34" began. Commandant Rogers stated that it was very desirable that the question of title should be settled and suggested that the matter be referred to the District Attorney. On September 29, 1873 Commandant Rogers sent out a steam launch with carpenters and material for putting up a cabin on the far end of the swamp land comprising Survey "569" on Sonoma Creek. (R. 776.) Also a cabin was put on the swamp land about a mile north of the foundery on the San Pablo Bay side. (R. 777.)

On November 19, 1873 the Board reported on the development of Mare Island stating that they had been informed by Commandant Rogers that there was a question as to the title to the tule on the northerly side of the Island, certain parties claiming the same by virtue of a title held from the State of California. (R. 486-489.) On November 25, 1873 Commandant Rogers wrote to the Board of Supervisors of Solano County stating that certain persons having petitioned the Board of Supervisors to adopt measures to reclaim the tule land appertaining to Mare Island, it was his duty to notify the Board that this land was claimed and occupied by the United States under a purchase of the land dated January 4, 1853. (R. 800-801.) On November 24, 1873 Commandant Rogers wrote to the Registrar of the State Land Office, Sacramento, California, notifying him that the tule land of Mare Island was claimed and occupied by the United States. (R. 838-839.)

On July 19, 1877, H. G. Rollins, the United States Surveyor General for California ordered James E. Freeman, Deputy Surveyor, to survey the Bissell and

Aspinwall claim. (R. 563-565.) The survey was completed by Freeman on August 1, 1877 and in it he included about 7½ miles of the swamp land North of Mare Island, including both Survey "34" and part of Survey "569" up to a series of sloughs which he found traversed the swamp. The total amount included by Freeman as Mare Island was 5227 29/100 acres. (R. 711-720.) On January 18, 1878 I. W. Ames, Rollins' successor, executed a certificate to the effect that notice of the Freeman survey had been advertised as required by the Act of July 1, 1864. The certificate also stated that the plat of the survey was retained in the office subject to inspection for 90 days from the date of the first publication. (R. 709-710.)

On July 5, 1879 Attorneys representing respondent's predecessors wrote to the United States Surveyor General for California protesting against the Freeman survey and against the signing and confirmation thereof, and respectfully requesting that if notwithstanding the protest the Surveyor General should sign such survey and forward the same to the General Land Office he should at the same time forward the protest. This protest was made on behalf of not only the owners of Survey "34" but also the owners of Survey "569". (R. 583-585.) On July 16, 1879, the same Attorneys wrote to the Commissioner of the General Land Office stating that it had come to the knowledge of the owners of certain tule, swamp or overflowed land adjacent to Mare Island that the Government had recently surveyed the land to itself. The letter made a formal protest against the survey and against the consideration or confirmation of the survey by any Department or

Bureau of the Government, and requested that if testimony be necessary the Commission take the same at the earliest practicable date. (R. 589-590.)

On July 25, 1879, the Commissioner of the General Land Office wrote to the United States Surveyor General at San Francisco to forward a copy of the final confirmation of Mare Island to Bissell and Aspinwall by the United States District Court and asked whether the Island had been surveyed. (R. 732-733.)

On August 7, 1879 the Surveyor General replied that although it appeared from the Court records that a decree of confirmation was ordered to be entered on March 2, 1857, no such decree had been found. The Surveyor General stated that there was enclosed with the letter a copy of the plat of survey and field notes of Freeman's survey, together with the protest made by the Attorneys for Respondents' predecessors. With regard to the Freeman survey the Surveyor General stated that he considered the survey incorrect, in that it not only included tracts which were properly islands in themselves but also embraced a large quantity of tide land, and stated that the survey should be limited to the area contained south of a line run across the Island from the vicinity of station No. 54 to station No. 138. (R. 593-594.) The line so run excludes the land here in controversy. Pursuant to Wagner's recommendation the Commissioner of the General Land Office declined to accept the survey. (Pltffs. Ex. J; pp. 46-47, 58, original.)

On December 5, 1883, the District Attorney in California advised the Navy Department that a suit had been instituted against the Government for the recov-

ery of a large tract of tule land at Mare Island. (R. 842.) The suit to which the District Attorney had reference apparently was that of *San Francisco Savings Union* v. *Irwin,* 28 Fed. 708, affirmed 136 U. S. 578, in which ejectment was granted against the Commandant of the Navy Yard with regard to Survey "569". In the period from 1886 to 1900 the successful parties in this case built levees around all of Survey "569" and a large part of Survey "34". (R. 597, 599, 778, 850, and map opposite R. 614.) The land thus reclaimed was used for pasture and hay land. (R. 599.)

On February 25, 1886, a corrected report of Spanish and Mexican grants in California was prepared by the State Surveyor General and published as a supplement to his official report. (R. 531-532.) This statement shows the claim of Bissell and others to Mare Island but indicates that no final decree had been entered on the claim and indicates that the claim had not been entered on the General Land Office map.

By 1905 Respondents' predecessors had commenced a suit in ejectment against the Commandant of the Navy Yard for possession of Survey "34". (R. 735-738.) This litigation finally reached a decision in the Federal District Court on February 7, 1914. *Sawyer* v. *Osterhaus,* 212 Fed. 765, (C. C. N. D. Cal.). The Court held that since Respondents' predecessors had no legal title, the legal title remaining in the United States until issuance of patent, the action of ejectment could not be maintained.

Meanwhile on July 29, 1912, the State of California had applied to the United States Land Office for certification to it of Survey "34" as swamp land passing

under the Act of 1850. (R. 543.) This application was still pending at the date of the decision in *Sawyer* v. *Osterhaus*. Shortly after that decision the Commissioner of the General Land Office advised that possession should be taken of Survey "34" without delay and the United States in that same year erected a fence at the northerly boundary of Survey "34", commencing steps to fill in the land for Government use. (R. 623, 786.) A new dike was built by the Government joining the dike originally erected by the private parties and running in the general direction of the Engineering Building so as to enclose that part of Survey "34" which was not enclosed by the privately built dike. (Defts. Ex. 3, reproduced App. *infra*, p. 120.) Thereafter a contract was let for the filling in of this land. *Ibid.* This filling process was gradually completed during the following years, and buildings and other improvements were made thereon.

On September 16, 1914, California's application for certification of the land was rejected, subject to appeal to the Secretary of the Interior, by the Land Office. (R. 543-551.) However, on November 12, 1914, the Interior Department wrote to the Register and Receiver at San Francisco stating that the previous rejection was held up to await a survey. (Ex. J, p. 35, original.) Respondents' predecessors had brought a mandamus action in the Supreme Court for the District of Columbia to require a survey of Mare Island. A writ requiring such survey issued in this proceeding on February 15, 1915. (R. 181.) In response thereto the United States Surveyor General, with the approval of the General Land Office, ordered one Lightfoot to make the

survey. (R. 596; Pltffs. Ex. J, p. 37, original.) The Lightfoot survey was made in August, 1915, and Lightfoot's report was filed on October 11, 1915. (R. 595-620; Ex. J, p. 27, original.) After consideration of this survey the Interior Department on December 4, 1920 vacated its previous decision (Ex. J, pp. 36-37, original) and on January 27, 1921, instructed one Joy to make a further survey and report with regard to the land in controversy. (R. 622.) On October 23, 1922 Joy filed a report in which he found that in 1850 the narrow strip just to the North of Mare Island was overflowed by extra high tides and at ordinary high tides with a stiff wind from the Southwest. (R. 621-627.) On August 17, 1923 the Land Office rejected the original Joy survey and ordered it revised. In this decision it was also determined that a patent should issue for Survey "569" but should not issue for Survey "34". (R. 630-632; Pltffs. Ex. J, pp. 37-39, original.) On November 8, 1923, a revised plat was filed by Joy. (R. 627-629.)

Thereafter respondents filed in the Supreme Court for the District of Columbia a petition for a writ of mandamus to require the Secretary of the Interior to decide whether the land in controversy was in 1850 swamp and overflowed land within the meaning of the Swamp Land Act. The relief prayed for was granted on May 27, 1924 and in response to the writ of mandamus the Secretary of the Interior on January 10, 1926, determined that the lands were swamp and overflowed lands in 1850, but refused to certify the lands for patent until the Secretary of the Navy had time to offer objections. On February 12, 1925, the Secretary

of the Navy filed a protest with the Secretary of the Interior against the issuance of the patent, and on October 13, 1925, the Secretary of the Interior decided that he would not certify the land for patent. (Pltffs. Ex. J, pp. 48-58, original.)

On May 25, 1925, respondents filed in the Supreme Court for the District of Columbia a petition for a writ of mandamus to require the Secretary of the Interior to issue a patent. (Pltffs. Ex. J, pp. 1-4, original.) The Supreme Court for the District of Columbia determined that the writ should issue and this determination was affirmed by the United States Court of Appeals for the District of Columbia in *Work* v. *United States ex rel O'Donnell,* 23 F. (2d) 136. No petition for certiorari was filed in this Court. Thereafter on March 8, 1928, in response to the writ of mandamus, the Secretary of the Interior directed the Commissioner of the General Land Office to issue the patent. (R. 35-36.) On March 9, 1928, a patent to Survey "34" was issued to California. (R. 33-35.) It is this patent together with the patent issued by California to Darlington in 1857 that the Government seeks to cancel in this action.

On the 15th day of April, 1930, George J. Hatfield, United States Attorney for the Northern District of California filed an *ex parte* motion in the United States District Court for the Northern District of California bearing the title of the confirmation proceeding of the Castro grant, viz: *"United States* v. *G. W. P. Bissell and W. H. Aspinwall",* in which he asked the Court to enter a decree *nunc pro tunc* as of March 2, 1857, affirming the decision of the Board of Land Commissioners confirming the Castro grant. Pursuant to this mo-

ion United States District Judge A. F. St. Sure (the ame Judge that heard the instant case below) on April 5, 1930, entered a decree *nunc pro tunc* affirming the Land Commission decision. (R. 289-291.) This *nunc pro tunc* decree states that on March 2, 1857, the Court directed the entry of a decree of confirmation in the matter by consent of the United States District Attorney, but that a decree in conformity with the order had as yet never been entered and that the case was still pending and undecided. The *nunc pro tunc* decree further states that all right, title, and interest of the appellees (claimants) had passed to and been acquired by the United States, the appellant, by purchase from the appellees and that all persons claiming thereunder or through the appellants or appellees or any of them were chargeable with notice of the action and of every thing that had been done therein, and therefore that no rights of third persons had intervened or could intervene.

The instant proceeding was commenced by the United States in November, 1930. (R. 18.)

SUMMARY OF ARGUMENT.

The United States seeks to cancel Respondents' patents issued under the Swamp Land Act of 1850 (App. *infra*, pp. 96-97) on the ground that the land had passed into private ownership by virtue of a grant of Mare Island purportedly made by the Mexican Governor of California in 1841. The rights under this purported grant were purchased by the United States in 1853. Although this grant has heretofore been held to be fraudulent at the instance of the United States, (see

Bouldin v. *Phelps*, 30 Fed. 547, C. C. N. D. Cal.), the United States now takes the position that the validity of the purported grant is conclusively established by certain proceedings brought for its confirmation.

(1) Even assuming the validity of the Mexican grant, however, it does not cover the land in controversy, which is below highest high tide. Under the Civil Law in force in Mexico, the seashore ran to the highest annual high tide and a grant of land bordering on tidal waters terminated at that point. Moreover, the grant was generally understood at the time to cover only the highlands.

No enlargement of the grant has occurred since California was ceded to the United States. The United States may not rely on the confirmation proceeding to accomplish this result, but even if that proceeding were to be considered it would not establish any enlargement. The purpose of that proceeding was simply to confirm the rights which existed prior to the cession, not to add to those rights, and interpreted in this light, a confirmation decree will not be considered as an enlargement of the area originally granted unless that result is clearly required by the language of the decree. The decree of the Board of Land Commissioners here stated that the land, being an island, was "bounded by the water's edge" and the District Court in its *nunc pro tunc* decree refers to Mare Island "with its natural boundaries". This language is entirely consonant with the original boundaries of the grant. Furthermore the Government is limited by the extent of the claim made in the confirmation proceedings, which was limited to the highlands. No different result can be drawn from

the Freeman Survey, made under the unsigned and unentered decree of the District Court in the confirmation proceeding, because that survey was rejected both by the Surveyor General and the General Land Office.

(2) The existence and validity of the Mexican grant, however, has not been established. It is solely on the asserted conclusive and binding effect of the confirmation proceeding that the Government depends for this purpose. But that proceeding was collusive and nonadversary. Shortly after the petition was filed before the Board of Land Commissioners the United States bought the interest of the claimants and thereafter carried on the litigation as real party in interest against itself. On appeal, the Statement of the Case filed in the United States District Court specifically stated that since the United States had purchased the claim it had no objection to confirmation. No final decree was signed or entered at that time (1857) although one apparently was ordered, and 73 years later (1930) the United States Attorney applied for and received a *nunc pro tunc* decree confirming the claim. On these facts the case was undoubtedly collusive and nonadversary and any decree entered in it was null and void and not *res judicata* on innocent persons not parties thereto.

Moreover the basic principles dealing with representation of persons not actual parties to a suit forbid the contention that respondents are bound by this proceeding. Persons holding prior grants from the United States were not permitted to intervene in the proceedings for confirmation of Mexican grants, the intention being that their interests would be represented by the

United States. Here, however, the United States which, as party defendant was supposedly representing California, its grantee under the Swamp Land Act, bought up the rights of the claimants, adverse to California, and actively asserted them in the proceeding. In such a case California was not, in fact, represented in the proceeding and neither California nor its grantees are bound thereby.

Also on another ground the confirmation proceeding is not conclusive here. The Swamp Land Act of 1850 was a grant *in praesenti*. From the date of the Act the United States held legal title to these swamp lands in trust for California. While this relationship existed the United States could not, in equity, purchase an adverse claim to the property and establish that claim by litigation against itself as holder of the legal title. This disability is not dependent upon proof of actual fraud, nor is it confined to strict trustees, but it is a broad and absolute disability extending to all who act in a representative capacity.

Conclusiveness of the confirmation decree in no way can be supported on any laches of respondents. In 1873 when the Government first made an attempt to take possession, respondents' predecessors protested and they have been actively and continuously, to the knowledge of the Government, asserting their rights in the property ever since. The United States did not actually take possession and commence to improve the property until 1914, at which time there was pending the proceeding in the Department of the Interior which finally resulted in the issuance of a patent in 1928, and prior to which time an ejectment suit had been brought

and dismissed because respondents' predecessors did not have legal title.

(3) Assertion that the lands in controversy were withdrawn from the operation of the Swamp Land Act because claimed in 1850 under a Mexican grant rests upon a misconception of both the facts and the law. The land in controversy was not claimed under the purported Mare Island grant in 1850. That grant legally extended only to highest high tide and there is no evidence that anyone in 1850 was claiming to the contrary. Even if the fact were otherwise, however, the Swamp Land Act would still apply unless the land had actually passed under a valid Mexican grant covering the property. Withdrawal of land claimed to have been granted by Mexico but not actually covered by a valid grant was not effected by the Treaty of Guadalupe Hidalgo and is entirely dependent on statute. No statute withdrawing such lands had been enacted in 1850. There having been no withdrawal, the lands in controversy clearly passed to California under the Swamp Land Act, and the title of California and Respondents, California's grantees, may be defeated only by showing that the land had previously passed under a valid Mexican grant. No such showing is made here.

(4) The United States has acquired no title by adverse possession. At the time Commander Farragut took possession of the Island itself in 1854, it was understood that California had title to the swamp lands north of the Island and all parties acted accordingly for 19 years. Excursions on the land for sand and the setting up of a target for a ship to shoot at were, in that wild country, no evidence of claim to possession

or ownership. When, in 1873, the Commandant of the Navy Yard first decided to claim title to the land, he sent, over the protest of Respondents' predecessors, men to build two shacks on the swamp far north of the Island. These shacks were soon deserted, however, and after the decision of this Court in *Irwin* v. *San Francisco Savings Union,* 136 U. S. 578, holding that the Government had no right to possession of Survey "569", the Government abandoned any claim to the swamp lands north of the Island. The owners of Survey "569" thereupon built levees enclosing not only "569" but also most of Survey "34" here in controversy, and the land so reclaimed was farmed by the private parties until 1914 when the Government entered, took possession, built a fence on the northern boundary of "34", filled the land and commenced the construction of buildings and other works.

These facts show that no possession was taken by the Government until 1914 and possession from that time on would not establish adverse possession for the reason that proceedings were then pending before the Interior Department for a patent. These proceedings did not terminate until the issuance of a patent in 1928.

Constructive possession cannot be relied upon here for the reason that the title under which the Government occupied the Island did not with any definiteness, if at all, include the specific swamp lands here in controversy.

In any event, adverse possession does not run against grantees from the Government, as are respondents here, until patent is issued. No patent having been issued until 1928, the Statute of Limitations did not

commence to run until that time. And even if every factor were present here which would normally give adverse possession, the Government may not secure title from a citizen in that manner where that citizen has by protest timely apprised the Government of his rights.

ARGUMENT.

I.

Background of the Case.

In controversy here is title to part of a tract of swamp land lying north of certain highlands in San Francisco Bay known as Mare Island. Respondents hold patents to the land from the United States and the State of California under the Swamp Land Act of September 28, 1850, C. 84, 9 Stat. 519. (App. *infra*, pp. 96-97.) It is the contention of the United States that the swamp land was encompassed within an alleged grant of Mare Island by the Mexican Government to one Castro. The United States in 1853 purchased the rights under this alleged grant and by reason of that fact now claims a paramount title to the swamp land and brings this proceeding in equity seeking cancellation of Respondents' patents and the quieting of title in itself.

This Court has already had before it the question of the status of this swamp land. *Irwin* v. *San Francisco Savings Union*, 136 U. S. 578. The swamp land north of Mare Island was divided into several tracts and sold by California under the Swamp Land Act. The tract closest to the Island and identified as California State Segregation Survey "34", was purchased by Respon-

dents' predecessors and is the part in controversy here. The tract adjoining Survey "34" to the north and identified as California State Segregation Survey "569", was purchased by others. The *San Francisco Savings Union* case was a proceeding in ejectment against the Commandant of Mare Island Navy Yard brought by the purchasers of Survey "569". This Court affirmed per curiam the decision of Mr. Justice Field on circuit holding that the United States received no title to the swamp lands north of the Mare Island highlands under the purported Mexican grant.[2]

Shortly after the decision in the *San Francisco Saving Union* case, a proceeding in ejectment to recover the whole of Mare Island was brought by parties claiming under a conveyance from Castro prior in time to the conveyance from Castro under which the United States claims title. In defending the case the District Attorney, representing the Commandant of the Navy Yard, and one A. L. Rhodes, representing the United States, successfully contended that the alleged Mexican grant to Castro was fraudulent and that Mare Island passed from Mexico to the United States as part

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[2] There is now pending in the District Court below an action (*United States* v. *Stewart*, Equity 2685-5, D. C. N. D. Cal. S. D.), similar in character to the instant case, brought by the United States to cancel the patents issued under the Swamp Land Act to Survey "569", in spite of the holding in the *San Francisco Savings Union* case that the Government had no right to possession of that property. Since the contention of the Government there, as here, is that the purported grant of Mare Island covered all of the swamp land north of the Island up to a series of sloughs which have been found to cross the swamp, the District Court is holding the proceeding under advisement pending the final outcome of the case at bar.

of the public domain. *Bouldin* v. *Phelps,* 30 Fed. 547 (C. C. N. D. Calif.)[3] The United States now claims under the grant which it repudiated in the *Bouldin* case.

About 1905 Respondents' predecessors in title brought ejectment proceedings against the Commandant of the Mare Island Navy Yard to secure possession of Survey "34". (R. 736-738.) These proceedings terminated in 1914, the Court holding that ejectment would not lie because Respondents' predecessors held no patent. *Sawyer* v. *Osterhaus,* 212 Fed. 765 (C. C. N. D. Calif.)

Meanwhile in 1912 Respondents' predecessors had commenced proceedings in the Interior Department to secure a patent. By means of three separate mandamus suits requiring the performance of various ministerial duties, the last of which went to the Circuit Court of Appeals for the District of Columbia (*Work* v. *United States ex rel O'Donnell,* 23 F. (2d) 136) Respondents finally, in 1928, secured the issuance of a patent to California under the Swamp Land Act. It is this patent together with a patent from California to Darlington, Respondents' predecessor, that the United States seeks to cancel by this proceeding.

Two principal issues marked the trial of the instant case in the District Court. One was whether the lands in controversy were covered by the purported Mexican grant. If not, of course, the title asserted by the

[3] It is interesting to note that in this case Castro testified that he never signed the conveyance to Frisbie and Simmons under which the United States now claims title, but that on the contrary his name was forged thereto. 30 Fed. at pp. 576-577.

United States completely fails and the lands were properly patented to California. The other was, assuming that the Mexican grant covered the lands in controversy, whether the Mexican grant was established as against respondents by the introduction of the record of a proceeding brought for confirmation of the grant before the Board of Land Commissioners, and on appeal before the United States District Court. It is clear, and it is not argued to the contrary in the brief for the Government, that unless the confirmation proceedings are *res judicata* and binding on respondents as to the existence, validity, and extent of the Mexican grant, the asserted title of the United States has not been and cannot be established.

The District Court found in favor of the Government without writing an opinion. The majority of the Circuit Court of Appeals, after a detailed examination of the case and consideration of briefs filed both on original argument and on rehearing, held that the proceeding for the confirmation of the Mexican grant was not *res judicata* on respondents and did not establish the title of the Government to this property and reversed the decree of the District Court.

The principal issues remain the same in this Court. However, two additional contentions are raised by the Government, one being that it has acquired title by adverse possession, and the other being that the Swamp Land Act had no application to the land in controversy because the land was assertedly claimed under a Mexican grant in 1850.

II.

The Mexican Grant Did Not Cover the Land in Controversy.

A. The grant ran only to the point of highest high tide.

The purported grant by Mexican Governor Alvarado to Castro, upon which the United States now relies, was of "an adjacent island in the Bay of San Francisco called 'Mare Island' ". (R. 248.) This grant did not, we submit, cover the swamp lands north of Mare Island which are here in controversy.

In the Appendix to this brief we have reproduced the relevant portion of a number of maps, extending from the year 1827 to the year 1926, which were introduced into evidence by the Government in this case and which are before this Court as original exhibits. (See footnote 1, *supra,* p. 4.) These maps show Mare Island as a compact, hilly body of land of 2 or 2½ miles in length, surrounded on all sides by water except as joined on the north by a narrow neck of swamp land. From this narrow neck, swamp land gradually extends out fanwise for many miles to the northwest. The tract here in controversy extends from the bank marking the northern end of Mare Island some distance into the fanwise extension.

The swamp lands north of Mare Island were, in the period of 1840 to 1860, at about the elevation of mean high water, it being a disputed point between the parties to this proceeding whether, on the evidence in the record, they were slightly below or slightly above that mark. (R. 600, 815.) The evidence all agrees, however, that they were overflowed by the tides several times a month (R. 803-805, 815), and were entirely be-

low the line of highest regular high tide (R. 622-627, 792; Pltffs. Ex. KK, original).

It is the contention of the United States in this case that by granting Mare Island, Governor Alvarado also granted all swamp land north of the Island to a point where cut off by navigable water or at least by the line of ordinary high tide. Under its claim that the swamp lands are slightly above ordinary high tide, the United States asserts title to all the swamp lands lying between Mare Island and a series of connecting sloughs which have been found to cross the fanwise extension of swamp lands some 7½ miles north of the Island. Included in the area thus claimed is all of Survey "34" and a large part of Survey "569".

Among the maps before this Court as original exhibits are a number covering the period from 1827 to 1849 which are among those reproduced in the appendix to this brief (*infra,* pp. 110-115). These indicate the nature of the Island as it was known in 1841 at the time of the purported grant to Castro. We invite the Court's particular attention to the fact that these maps show no water course crossing the swamp land at any point north of Mare Island. In other words, it may be taken from these maps that in 1841 the swamp lands were thought to stretch without a break from the narrow neck which adjoined Mare Island until they met the high lands of California in the upper reaches of Sonoma Creek. Even Ringgold who surveyed this area in 1850 was uncertain as to whether any water-course crossed this swamp as may be seen by comparing two of his maps. (Pltffs. Exs. L11 and L13, reproduced App. *infra,* pp. 114-115.)

By reason of the fact that in 1841 no water-course was known to cross the swamp, it is obvious that had the grant of Mare Island been intended by Governor Alvarado to extend to ordinary high tide, the grant could not have been of an island because, using ordinary high tide as a boundary and accepting the contention of the United States that the swamp lands were above that mark, what is now known as Mare Island would have been simply the end of an unbroken peninsula. Boundaries must have been intended by Governor Alvarado entirely different from the boundary of ordinary high tide now proposed by the United States, and the nature of the boundaries actually intended is clear when we consider the rules of the civil law which were in force in Mexico at the time of the grant.

Under the civil law, the boundary between the seashore, which is public, and the upland, which passes under private grants, is not the line of ordinary high tide but is the line reached by the highest tide during the year. *Borax Consolidated* v. *City of Los Angeles,* 296 U. S. 10, 22; *Lux* v. *Hagin,* 69 Cal. 255, 315-333, 10 Pac. 674; 25 Ops. A. G. 172, 174; Hall's Mexican Laws, (ed. 1885), sec. 1466; Sherman, Epitome of Roman Law, sec. 82; Hunter, Roman Law, (3rd ed.), p. 310; Partida III, tit. 28, law 4, (Scott's Translation, 1931); Bouviers Law Dictionary, "seashore". In the case first cited Mr. Chief Justice Hughes, delivering the opinion of this Court, said (p. 22): " * * * by the civil law the shore extends as far as the high waves reach in winter. * * * " This Court, of course, will

in this proceeding take judicial notice of the Mexican Law. *United States* v. *Chaves,* 159 U. S. 452.

A grant of uplands bordering on tidal water conveys, under civil law, no title to this seashore between low tide and the highest annual high tide. Colquhoun, Roman Civil Law, (1851), secs. 922, 923; Chamier, Roman Law, (1893), p. 79; Hunter, op. cit. The Institutes of Justinian and the Partidas class the seashore among those things which are by natural law common property of all people. Lib. 2, Tit. 1, Sec. 1; Partida III, op. cit. See also *Lux* v. *Hagin, supra;* Hall's Mexican Laws, op. cit.. The decisions of this Court in *Costas* v. *Insular Government,* 221 U. S. 623 and *United States* v. *Coronado Beach Co.,* 255 U. S. 472, are not to the contrary, since those cases merely held that under civil law a direct and specific grant by the sovereign of the seashore itself would be valid.

As we have heretofore pointed out, even the Government's evidence in this case establishes that the lands here in controversy were overflowed by the tides several times a month. (*Supra,* pp 31-32). At such times the tides reached to the bank at the northern end of Mare Island which was the dividing line between the uplands owned by the United States and the swamp lands to which Respondents hold title. Under the law in force in Mexico at the time, then, the grant of Mare Island conveyed to Castro only the land to this point of highest high tide. It is evident that no title to the land now in controversy passed under that grant.

Not only is this conclusion required by the Mexican law but also the same conclusion would follow even if

the law were less clear. From the surrounding circumstances it is to be inferred, we think, that Mare Island was understood at the time to include only the highlands and that no more than that was intended to be granted by Alvarado.

In addition to the fact that, unless it terminated at the edge of the highland, Mare Island would not have been considered an island in 1841, of particular significance is the testimony of Mariano G. Vallejo, a witness for the claimants in the proceeding brought for the confirmation of the Castro grant. Vallejo was a lawyer, one of the leading citizens of California at the time, and had lived in the immediate vicinity of this island for many years. His testimony was that Mare Island was some 2½ miles in length and contained about ½ league of land, a little more or less. (R. 237-238.) Vallejo's estimate of the length of the island when applied to the uplands only, including none of the swamp lands north of the island, was approximately correct. His estimate of area, applied in the same manner, also was surprisingly close. A half league square of land in California is about 1085 acres. *United States* v. *Perot,* 98 U. S. 428, 432. The actual area of Mare Island not including any of the swamp land north of the Island is 897 acres. (R. 456.) It is obvious that Vallejo believed Mare Island as granted to Castro included only the highlands and that the boundaries of the island were at the line of highest high tide. Certainly it could not be contended that he believed Mare Island to extend to the limits urged by the United States which would produce an island 10 miles in length and 5227 acres in area. (R. 486, 579.)

As further indication that in those early days the Island was generally supposed to include only the highlands, the report of the Sloat Board on November 6, 1852, should be considered. That Board reported that the whole length of the Island was about two miles and that it contained about 900 acres. (R. 357.) They further state that they had made a careful survey of the Island and that this survey was shown on plat no. 7 being sent with the report. (R. 351.) The Island as shown on this plat consisted only of the highlands and did not include any of the swamp lands lying to the north. (R. 842-843.) The force of this evidence is in no wise shaken by the fact that the following December, in answer to an inquiry as to the value of the lands from the Secretary of the Navy, who was negotiating a purchase from the land speculators who, having bought Castro's title, were claiming and proposing to sell under it not only the uplands but also an undelimited amount of swamp lands, the Sloat Board states that the Island includes about 900 acres "in addition to a large tract of tule extending toward Napa and Sonoma". (R. 324-325.) The inference is clear that the Board still was of its original opinion that the Island itself consisted of the uplands, but felt called upon to express its opinion on the value of that which was claimed by the speculators.

In addition there is the fact that the early maps which named Mare Island all centered the name on the highlands in such a way as to preclude the possibility that the swamp lands were understood to be part of the Island. (See Pltffs. Exs. L 11, L 12, L 17, and L 25,

reproduced App. *infra* pp. 114-117. Also see Pltffs. Exs. L 10, L 13b, L 16, and L 18, original.)

We submit that, when made, the purported Mexican grant of Mare Island conveyed no title to the land in controversy and that unless it be found that the limits of the grant have been subsequently extended, the title asserted by the United States in this proceeding completely fails and Survey "34" was properly patented to Respondents.

B. Original limits of the grant were not extended by the confirmation proceedings.

The only possible source from which it might be urged that the area originally purportedly granted by Governor Alvarado to Castro has been extended is the proceeding brought for the confirmation of the Castro grant. Upon consideration, however, it is clear that the confirmation proceeding has had no such result.

In the first place the confirmation proceeding is not binding on, and cannot be used as evidence against, Respondents, for the reason that the United States, while apparently resisting the Mexican claim, purchased and actively supported that claim. This matter will not be elaborated here since it is considered at length later (*infra* pp. 45-70) in connection with the lack of proof of the existence of a valid Mexican grant. However, this fact is here equally fatal to the position of the Government, since, as we have shown, the grant, unless extended in some way by later proceedings, did not cover Survey "34".

Even if we were incorrect in our position that the Government cannot rely on the confirmation proceed-

ing against Respondents, however, and it were thought that the confirmation proceeding could be considered here to determine whether the Mexican grant had been extended, the result would be the same. No enlargement of the limits of the grant has been accomplished by that proceeding.

The purpose of the consideration of Mexican grants by the Board of Land Commissioners and the courts should be carefully borne in mind in this connection. That purpose was not to make new grants of land but was merely to confirm what had already been granted. The spirit of the Treaty of Guadalupe Hidalgo and, indeed, the principles of International Law, contemplated that land held in private ownership at the time of the cession should be respected. But this applies only to the rights then held; it does not imply that the United States was to make any addition to those rights and the cession in no way increased those rights. *Ely's Administrator* v. *United States,* 171 U. S. 220, 239.

In providing a procedure for passing on Mexican claims, Congress did not empower the Commission to dispose of land or to initiate titles. The Board of Land Commissioners and the courts were merely to determine and confirm the rights as they existed prior to the cession. A confirmation decree is simply declaratory of those rights and is not to be construed as extending them in any sense *Henshaw* v. *Bissell,* 85 U. S. 255; *Ely's Administrator* v. *United States, supra; Los Angeles Milling Co.* v. *Los Angeles,* 217 U. S. 217; *Boquillas Land and Cattle Co.* v. *Curtis,* 213 U. S. 339. Cf. *United States* v. *Levy,* 13 Pet. 81; *United States* v.

D'Auterieve, 15 How. 13. If, for example, in any case there had been a delivery of juridical possession by the Mexican officials, the boundaries set at the time of that delivery must be followed by the Surveyor General in surveying the land under the confirmation decree, in the absence of some provision in the decree clearly requiring some other result. *Graham* v. *United States,* 4 Wall. 259; *Van Reynegan* v. *Bolton,* 95 U. S. 33.

Since the purpose of a decree of confirmation is but to confirm the rights which existed prior to the cession, such a decree should not be interpreted in a way that would extend those rights unless clearly and unavoidably required by the language of the decree.

Tested by this rule of construction, the proceeding brought for the confirmation of the Castro grant in no way extends the rights which passed under Mexican law. The decree of the Board of Land Commissioners states that the place "being an island is bounded by the water's edge". (R. 280.) Not only does this in no way compel the construction that it was intended or operated to enlarge the original grant, it does not even indicate such a result. From the records which are left to us by the Board, it does not appear that any maps were presented in connection with the proceeding. The Board, therefore, could not have had in mind any peculiarities of this particular Island and it is obvious that it was merely expressing the general rule of both civil and common law that the water's edge is the boundary. Nothing in the opinion suggests the particular tides to be used in determining the water's edge. It is significant in this connection that in at least one case where the Board intended ordinary high tide to be the bound-

ary, it used those specific words. *Knight* v. *United States Land Association,* 142 U. S. 161. The inference may be drawn that by the phrase "water's edge" a different line was meant.

Nor is any other meaning to be derived from the *nunc pro tunc* decree of the District Court if that may be looked to at all in this proceeding. That decree purports to confirm title to Mare Island "with its natural boundaries". (R. 290.)

Treating these decrees, then, as fully operative and entitled to be considered in the present litigation, we submit it to be clear that they may not be relied upon as enlarging the Castro grant. They contain no language which would overthrow the presumption that they were intended merely to confirm the grant and not to enlarge it.

Furthermore there exists another ground upon which it is to be held that the confirmation decrees did not enlarge the grant. This is the principle that a confirmation of a claim to land in California under a Mexican grant is limited by the extent of the claim made and the decree of confirmation cannot be used to maintain title to land not claimed. *Brown* v. *Brockett,* 88 U. S. 387; *Williams* v. *United States,* 92 U. S. (2 Otto) 457. The original petition of Bissell and Aspinwall before the Board of Land Commissioners merely claimed in general terms an island called "Isla de la Yegua". (R. 220-222.) The claimants' only witness as to the size of this Island, Mariano Vallejo, testified that it was about 2½ miles long and contained about ½ a league, more or less. (R. 237-238.) This, as we have pointed out (*supra* p. 35) would restrict the Island

to the highlands. Claimants put no other witnesses on as to size or boundaries nor did they challenge in any way the accuracy of the statement of their witness, Vallejo. It is obvious that in confirming Mare Island, the Board of Land Commissioners must have believed they were confirming an island approximately 2½ miles long and containing about ½ a league of land.

Before the District Court, claimants made it even more clear that they were asking confirmation only of the Island as described by Vallejo. They filed in the District Court a paper entitled "Index of Case". (Pltffs. Ex. C, original.) This index was headed by the following language: "Claim of G. W. P. Bissell and William H. Aspinwall to Mare Island, about ½ a league, in Sonoma County."

The claim presented to the Board of Land Commissioners and the District Court was, therefore, a claim to an island about 2½ miles long, containing about ½ league of land. When now the Government contends that the confirmation gives it title to an island four times as long and five times as large, it runs squarely into the rule of the above cited cases to the effect that they are entitled to no more than they claimed in the confirmation proceeding.

It may be that the Government, in attempting to answer our argument that the confirmation proceeding did not enlarge the Mexican grant, will suggest that the survey made by Freeman in 1877 determined that the land in controversy was covered by the confirmation decree. On the contrary, however, we believe it clear that the Freeman survey is not effective for any purpose whatsoever and that if evidentiary in this pro-

ceeding at all it supports the position of Respondents.

The Freeman survey was ordered on July 19, 1877 by H. G. Rollins, the United States Surveyor General for California. (R. 563-565.) Freeman completed the survey on August 1, 1877 and in it he included about 7½ miles of the swamp land north of Mare Island. (R. 711-720.) Notice of the Freeman survey was published by Rollins' successor, General Ames, in two newspapers, the first publication being on October 11, 1877, and the last one November 8, 1877. (R. 709-710.) On November 5, 1877, before the final publication, General Ames forwarded to the General Land Office a tracing for the account and also the account of Freeman in the sum of $404.94 for payment. (R. 700-701.) On January 18, 1878, General Ames executed a certificate to the effect that notice of the Freeman survey had been published as required by the Act of July 1, 1864. (R. 709-710.) Nothing more was done with regard to this survey until July 25, 1879 when the Commissioner of the General Land Office wrote to Theodore Wagner, the successor of Ames, asking whether the Island had been surveyed. (R. 732-733.) In response to this inquiry Wagner forwarded a copy of the plat of survey and field notes together with a protest which had theretofore been filed by the attorneys for Respondents' predecessors, and stated that he considered the survey incorrect in that it not only included tracts which are properly islands in themselves but also embraced a large quantity of tide land, and stated that the survey should have been limited to the area contained south of a line run across the island from the vicinity of station No. 54 to station No. 138. (R.

593-594.) The line so run would be at about the point where the highlands of Mare Island stopped at the north and would exclude the land here in controversy. No further steps were taken with regard to this survey either by the General Land Office or by the office of the Surveyor General.

The Act of July 1, 1864 (13 Stat. 332) above referred to, which was the statute under which the survey was made, expressly requires the approval of the survey by the Commissioner of the General Land Office and his endorsement on the survey of a certificate of his approval. Under this Act a survey had no official standing and was inoperative for any purpose until so approved. *Van Reynegan* v. *Bolton,* 95 U. S. 33; *McCreery* v. *Haskell,* 119 U. S. 327; *Frasher* v. *O'Conner,* 115 U. S. 102; *United States* v. *Hancock,* 30 Fed. 851; *Duncanson* v. *S. P. R. R. Co.,* 12 L. D. 664; 14 Ops. A. G. 74.

That the Freeman survey did not receive the express approval of the Commissioner of the General Land Office as required by the statute will not, we think, be denied by the Government. However, the Government contended below that the survey had been approved by implication because of later acts of the Secretary of the Interior. We submit that the express requirement of the statute that the approval of the Commissioner of the General Land Office be endorsed on the survey is not satisfied by an implied approval even if established. *Tubbs* v. *Wilhoit,* 138 U. S. 134, is in no way to the contrary since that case dealt with an entirely different statute which did not require the Commissioner to endorse his approval upon the survey. Nevertheless, the

record here in no way countenances an assertion that there has been any implied approval of the Freeman survey. The only material in the record to which the Government points in this regard is a letter dated September 22, 1905 from the Commissioner of the General Land Office to the Secretary of the Interior with regard to a request of the Navy Department for a survey of Mare Island. (R. 736-744.) This letter itself indicates clearly that the Freeman survey was never approved. The letter states (R. 738) that Mare Island is unsurveyed. Also, the letter goes on to recite the facts with regard to the Freeman survey and states that upon receipt of the survey from Wagner by the General Land Office no further action was taken and the letter was merely placed on file in the office. The reason why no further action was taken is stated to be because the United States purchased the Island from Bissell, Aspinwall and McArthur, based upon the survey executed by the Board of Officers of the United States, which survey was deemed sufficient for the purpose of conveying the land. (R. 743.)[4] Certainly there is in the letter nothing to support an allegation that the Freeman survey has in any way been acted upon by the Interior Department so as to give it approval. In fact we have the certificate of the Acting Assistant Commissioner of the General Land Office, executed in 1927, that the survey was unaccepted. (Pltffs. Ex. J, p. 58, original. See also pp. 46-47 of the same exhibit.)

We submit, therefore, that the purported grant of Mare Island to Castro, limited when made by the Mexi-

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[4] As we have already pointed out, this survey showed the Island as including only the highlands. (R. 842-843.)

can law to the area above the line of highest high tide, has not been in any way enlarged by the Land Commission proceedings. The swamp lands north of Mare Island passed to the United States by the cession and were properly patented to California under the Swamp Land Act.

III.

The Mexican Grant Has Not Been Established.

A. Confirmation proceeding is not res judicata.

If for any reason it be thought that the purported Castro grant extended to the land in controversy, still it is incumbent upon the United States to prove by proper evidence in this case the existence and validity of that grant before the United States can secure cancellation of Respondents' patents on the ground that the land had previously passed thereunder. Patents issued by the Government are solemn documents not to be cancelled lightly on hypothesis or inference. This Court has often stated that before a patent will be cancelled the United States must produce evidence which is unequivocal, which commands respect and which produces conviction. Cancellation cannot be had upon a bare preponderance of the evidence which leaves the issue in doubt. *Maxwell Land Grant Case,* 121 U. S. 325; *United States* v. *Stinson,* 197 U. S. 200; *Wright-Blodgett Co.* v. *United States,* 236 U. S. 397.

To prove the existence and validity of the Castro grant under which it claims, the United States in the District Court offered in evidence a transcript of the record of a proceeding brought for the confirmation of that grant. Some contention was made by the Govern-

ment in the Circuit Court of Appeals to the effect that proof had been made of the existence and validity of this grant independently of the confirmation proceeding. The Circuit Court of Appeals held to the contrary, however, and the contention is not repeated in the Government's brief in this Court, either by way of specification of error or argument. Indeed when the conclusive evidence against the validity of the Castro grant presented by the Government in *Bouldin* v. *Phelps, supra,* is considered, it is not difficult to see why the Government does not contend that it has an inherently good title. Whether or not the Castro grant has here been established, then, rests entirely on the effect of the confirmation proceeding.

The United States contends that the confirmation proceeding is conclusive upon Respondents as a binding adjudication of the existence and validity of the Castro grant. The assertion is that because the title of Respondents is derived from the United States, Respondents were represented by the United States in the confirmation proceeding and are bound by the result. That proceeding was brought before the Board of Land Commissioners and, on appeal, before the District Court, in accordance with the Act of March 3, 1851, C. 41, 9 Stat. 631 (App. *infra* pp. 96-104), which provides for a law agent to defend the claims on behalf of the United States and provides (Sec. 15) that final decrees shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons.

It is not our contention that Respondents are within the term "third persons" as there used and thus within

the exception made by the act itself, for we fully recognize that in the ordinary case a confirmation decree under the Act of 1851 is binding on those who claim under the United States. *Beard* v. *Federy,* 70 U. S. (3 Wall.) 478; *More* v. *Steinbach,* 127 U. S. 70; *Knight* v. *United States Land Association,* 142 U. S. 161. But this is no ordinary case of collateral attack. This is a case requiring, as we believe, application of the well settled principle that no matter how conclusive and binding an adjudication normally may be, it will not be *res judicata* on innocent persons where, by reason of the acts of one or more of the parties, the proceeding was fictitious and collusive and lacked the safeguards which are normally sufficient to insure a fair and correct determination of the issue. It appears to be the attitude of the Government (br. 35) that we are merely attempting to expand the meaning of the statutory phrase "third person". On the contrary, the principle upon which we rely is not bottomed upon any particular statute but is a general rule of equity applicable alike to all proceedings which are alleged to conclude the rights of persons not parties thereto.

Certainly the right of Respondents to a consideration of whether, on the facts of this particular case, they are entitled to the protection of this deeply rooted and salutary principle is not to be defeated by any plea concerning the importance of the sanctity and finality of Land Commission Decrees generally. California land titles are here in no way threatened. The application of basic equitable principles sought by Respondents goes no further than the facts of this case. In no instance other than Mare Island, that we know of, did

the United States purchase a Mexican claim and carry on a fictitious controversy with itself for the purpose of foreclosing the rights of its prior grantees. That is, as we shall develop, what has taken place here, and we urge that a court of equity will in no case permit the desirability of certainty with regard to land titles to foreclose consideration of the rights of the parties in a situation of this sort.

1. The Confirmation Proceeding was Collusive and Non Adversary.

Bissell and Aspinwall filed with the Board of Land Commissioners on August 31, 1852 their claim for confirmation of Mare Island under the Castro grant. (R. 220-222.) Even before that time they had been carrying on negotiations for the sale of the property to the United States (R. 367-372), and this sale was consummated on January 4, 1853 by the delivery to the United States of a quit claim deed to the property (R. 302-308).

By this conveyance the United States became the owner of the claim and the real party in interest in the proceeding for its confirmation. At this time no steps other than the filing of the petition had been taken in the confirmation proceeding nor was anything done in the proceeding until April 20, 1854. (R. 218.) The testimony presented to the Board consisted entirely of depositions and at the time all of the depositions were taken and at all times thereafter, the United States was not only the defendant in the case but was also the owner of the rights asserted by the plaintiffs.

The Board entered its decree of confirmation on May 8, 1855, from which an appeal was perfected to the District Court. (R. 277-283.) On March 2, 1857, upon a written representation by counsel for claimants that since the United States had purchased the claim and the rights thereunder inured to its benefit, there was no objection to confirmation (Pltffs. Ex. C, original) and "by consent of the United States District Attorney", the District Court made a minute order for a decree affirming the decision of the Board. (R. 566-567.) No judgment or decree, however, was signed at that time, but over 73 years later, on April 15, 1930, upon an *ex parte* application by the *United States* the Court entered a judgment and decree *nunc pro tunc* confirming the decree of the Board. (R. 289-291.) The *nunc pro tunc* decree recites on its face that the rights of the claimants had been acquired by the United States. (R. 290.)

It is apparent from these facts that, shortly after the proceeding before the Board of Land Commissioners was initiated and before any hearing or decision, there ceased to be any controversy. From then on there were no adversary proceedings—the Government owned and controlled both sides of the case—and the Government was, both in fact and in law, attempting to carry on litigation against itself. A judgment in form so procured is in the eyes of the law no judgment of the court, but is a nullity and cannot be controlling on innocent parties in subsequent litigation no matter how binding the judgment would have been if arrived at in an adversary proceeding.

The leading authority on the principles to which we advert is *Lord* v. *Veazie,* 49 U. S. (8 How.) 250. It was there shown to this Court that the plaintiff and defendant rather than being real adversaries had a common interest in the proceeding opposed to that of other persons who were not parties to the suit. Chief Justice Taney, dismissing the suit said (p. 255):

> A judgment entered under such circumstances, and for such purposes, is a mere form. The whole proceeding was in contempt of the court, and highly reprehensible, and the learned district judge, who was then holding the circuit court, undoubtedly suffered the judgment *pro formâ* to be entered under the impression that there was in fact a controversy between the plaintiff and defendant, and that they were proceeding to obtain a decision upon a disputed question of law, in which they had adverse interests. *A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity, and no writ of error will lie upon it.* * * * (Emphasis supplied)

The order of dismissal entered by the Court upon the basis of Chief Justice Taney's opinion recited that the judgment was a *nullity* and *void.* 49 U. S. at pp. 255, 256.

This same rule has been applied by this Court specifically to cases where, while the suit is pending, one party becomes the equitable owner of the opposing interest. *Cleveland* v. *Chamberlain,* 66 U. S. (1 Black) 419; *Wood Paper Co.* v. *Heft,* 75 U. S. (8 Wall.) 333. Indeed it may safely be said that whenever it has appeared that the party on one side of a case had any in-

terest in or control over the opposing side, this Court has applied the principle that any purported judgment entered in such a case would be a nullity and void. *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300; *Hatfield* v. *King*, 184 U. S. 162; *Gardner* v. *Goodyear, Dental Vulcanite Co.*, 131 U. S. appendix C-111; *Tennessee, etc. Railroad Co.* v. *Southern Telegraph Co.*, 125 U. S. 695; *Gaines* v. *Relp*, 53 U. S. (12 How.) 472, 537-539; *Gaines* v. *Henner*, 65 U. S. (24 How.) 553, 628-629.

So reprehensible is a proceeding where one party is in control of both sides that this Court has indicated that the carrying on of such litigation is punishable contempt of court. *Lord* v. *Veazie, supra; Cleveland* v. *Chamberlain, supra; Hatfield* v. *King, supra.*

Particularly has this Court condemned the carrying on of such non-adversary litigation for the purpose of attempting to prejudice the interests of third parties. *Lord* v. *Veazie, supra; Cleveland* v. *Chamberlain, supra.* Exactly this was the purpose of the United States in the confirmation proceeding as is clearly to be inferred from the *nunc pro tunc* decree submitted by the United States and signed by the same District Judge that tried the instant case. This decree recites (R. 290):

> AND IT FURTHER APPEARING, that all the right, title and interest of the Appellees herein in and to the said claim, have passed to and have been acquired by the United States, the Appellant herein, by purchase from the said Appellees, *and that all persons claiming by, under, or through the Appellants or the Appellees or any of them, are*

> *chargeable with notice of this action and of everything that has been done therein, and therefore, that no rights of third persons have intervened or could intervene.* (Emphasis supplied.)

This language purporting expressly to terminate the rights of all other persons in the property was of course not necessary to the mere entry *nunc pro tunc* of a decree affirming the decision of the Board of Land Commissioners. The insertion of this language was an attempt to foreclose rights of other persons not parties to the proceeding and demonstrates the motivating purpose behind the efforts of the United States to secure the entry of a decree against itself. When it is considered that the proceeding drifted without a final decree for 73 years, during which time the United States itself took advantage of the fact that it had not yet terminated (see *Bouldin* v. *Phelps, supra,* at p. 578) the application for this *nunc pro tunc* decree immediately after the patent had been granted to Respondents indicates that the Land Commission proceeding was important to the United States only insofar as it might conclude and bar Respondents' rights. It is, in fact, apparent that this was the only benefit which the United States could possibly derive from the *nunc pro tunc* decree and the Government does not, in its brief, suggest anything to the contrary.

The opinion of this Court in *Lord* v. *Veazie* is so applicable to these facts as to warrant quotation of the following passages therefrom (49 U. S. at p. 254):

> On the contrary, it is evident that their interest in the question brought here for decision is one and

the same, and not adverse; and that in these proceedings the plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not parties to this suit, who had no knowledge of it while it was pending in the circuit court, and no opportunity of being heard there in defence of their rights. And their conduct is the more objectionable, because they have brought up the question upon a statement of facts agreed on between themselves, without the knowledge of the parties with whom they were in truth in dispute, and upon a judgment *pro forma* entered by their mutual consent, without any actual judicial decision by the court. It is a question, too, in which it appears that property to a very large amount is involved, the right to which depends on its decision.

A decree which, as held in the above cited cases, is null and void because given in a proceeding in which the same party was both equitable plaintiff and actual defendant, obviously cannot be urged as conclusive upon the rights of innocent persons, and to this effect have been the decisions of this Court. *Andes* v. *Ely,* 158 U. S. 312; *Michaels* v. *Post,* 88 U. S. 398, 426; *Cochrane* v. *Deener,* 95 U. S. 355. In the first cited case the validity of a municipal bond issue was reexamined although the bonds had previously been held valid in an action against the Town on an interest coupon owned by the Town. In the last cited case this Court had previously held certain patents to be valid but when later it was shown that the parties to the suit had, prior to argument, concluded some sort of a conditional

agreement whereby the controversy was no longer really adversary, this Court stated that other parties should not be concluded from having a hearing on the validity of the patents whenever their cases were presented.

This is but an application of the general principle of *res judicata* that whenever, by reason of something done by a party to the proceeding, there was no adversary trial or decision of the issue in the case, the decision does not prevent a reconsideration of that issue at the instance of innocent persons in a subsequent action. *United States* v. *Throckmorton,* 98 U. S. 61; *Johnson* v. *Waters,* 111 U. S. 640; *Michaels* v. *Post, supra.*

The attempted distinction of *Lord* v. *Veazie* and *Cleveland* v. *Chamberlain* in the Government's brief (footnote 28 p. 71), to the effect that those cases do not apply to proceedings which are non-adversary where the Court is advised of the fact and nevertheless proceeds to a decree, is without merit. If, as this Court has held, the action of parties in presenting such a case is a reprehensible, punishable contempt, then certainly the action of a judge in entering a decree in such a case when advised of the facts is an abuse of the judicial function. Irrespective of this, however, the decisions in *Lord* v. *Veazie* and *Cleveland* v. *Chamberlain* were to the effect not only that this Court would not entertain such a proceeding but also that any decree entered in such a proceeding was *null* and *void.*

Two arguments are made by the Government in its attempt to avoid the application of the principles we are now discussing. One is that even though the United States was the owner of the claim sought to be

confirmed, the United States actually contested the claim and, therefore, there was a genuine controversy. (Govt's. br. pp. 45-52, 66-67.) The second is that even though there were no adversary proceeding and even though the decree of the District Court were, consequently, not *res judicata,* still the decree of the Board of Land Commissioners is binding because the proceedings before that Board were not meant to be adversary. (Govt's. br. pp. 67-70.) In other words this second contention is that the ordinary rules of *res judicata* with regard to collusive and non-adversary suits have no application to proceedings before the Board.

(1) We might answer the first contention by simply pointing out that when it appears that a proceeding was not between parties whose interests were opposed, the court will not go back of that fact and attempt to evaluate the efforts which were put forth by the parties to determine whether the proceeding was, in fact, completely and fairly tried. Obviously, the Court would be in no position to determine what showing could have been made in the case if the interests had been adverse. In the case of *Cleveland* v. *Chamberlain, supra,* the defendant did not purchase the plaintiff's rights until after the case had been tried below and this Court found that until that purchase the case had been prosecuted with vigor, yet this Court dismissed the case as being non-adversary.

However, we prefer flatly to meet the Government on its assertion that the United States actually and vigorously contested the confirmation of the grant throughout the proceeding. The record speaks elo-

quently to the contrary, in our opinion. Most of the argument on this point in the Government's brief is to the effect that the Government officers acted in good faith and had some incentive to offer a defense to the claim. The fact that the officers had good motives, however, cannot prove that they actually and continuously contested the claim when the record establishes the contrary.

A reading of the testimony presented to the Board (R. 222-247) will indicate, we believe, that the defense to this claim was only half heartedly conducted. Certainly this must be the conclusion when that defense is compared with the case made against the grant by the Government in *Bouldin* v. *Phelps, supra,* when the Government was really vitally interested in defeating the grant. But the actual attitude of the Government in the confirmation proceeding is most clearly indicated after the case reached the District Court. There the counsel appearing in behalf of the claim filed a paper entitled "Index of the Case" which was, it would seem, a summary of the facts made for the convenience of the District Court. (Pltffs. Ex. C, original.) At the end of this index is the following statement:

> The United States being now the owner of the titles of appellees, a confirmation of this claim inures to the benefit of the Government and no objection is therefore made to a decree in favor of the validity of the claim.

In no way this statement denied by the United States Attorney. On the contrary we find in the minutes of

the Court for March 2, 1857 an entry that a decree of confirmation was entered "by consent of the United States District Attorney". (R. 567.)

How it can be argued in the face of these facts that the United States continued to contest the claim even though it had purchased it, we fail to see. If there had been an actual contest by the United States and the case had been tried *de novo* in the District Court as contemplated by the statute, the result might have been quite different. The decision of the Board was delivered before the widespread extent of fraudulent land claims in California was known and before the Archives of the Mexican Government in California were collected so as to present a reliable base for decision. *Cummings and McFarland, Federal Justice,* pp. 134-139. Castro claimed to have received a grant from Alvarado to another island in San Francisco Bay and this claim was also confirmed by the Board. On appeal, however, the Government not having purchased that grant, actively contested it. Upon trial before the District Court in 1858, the Board was reversed, despite positive testimony by Alvarado that he made the grant. The District Court held that the absence of a record of any final grant in the Archives, a condition also existing in the case of Mare Island, was determinative against the grant. *United States* v. *Pollack,* 1 Hoffman Land Cases 284.

Furthermore the assertion that the United States actually contested this claim is conclusively answered, we submit, by the action of the United States in securing the *nunc pro tunc* decree in 1930. No decree was actually signed or entered in 1857. Thereafter, 73 years

passed without further action in the case. During that period the status of this confirmation proceeding was mooted in at least two lawsuits and in each it was held that no final decree had been entered which could constitute estoppel or *res judicata*. *San Francisco Savings Union* v. *Irwin, supra; Bouldin* v. *Phelps, supra.* Then two years after the issuance of the patent to Survey "34" by the United States to California and just prior to the commencement of this suit, an *ex parte* application for a decree *nunc pro tunc* was made, not by counsel for the claimants but by the United States District Attorney. (R. 289-291.) We submit that if the United States was actually and in good faith contesting a proceeding it would not have applied for and secured such a *nunc pro tunc* decree against itself. No advantage accrued to the United States from so doing except insofar as it might benefit the United States *as owner of the confirmed claim* against the rights of parties claiming under the United States in its capacity of defendant. In other words, in securing the final decree in the confirmation proceeding the United States was *actively supporting* and *asserting* the claim which the United States as defendant was supposed to be contesting.

When these facts are considered one may well question even the good intentions of the Government officers upon which the United States so strongly relies. Attorney General Cushing, with his sound judgment and insight, foresaw that the United States could not properly neglect to contest the proceeding strongly at every stage (8 Ops. A. G. 443), but his warning was soon forgotten. The rights which the United States

had under the bond given by Aspinwall (R. 308-312), of which the Government seeks to make so much (br. 47), do not seem to have been sufficient to persuade the Government officers that they had more to gain from defeating the claim than from securing its confirmation. And even as a matter of law, irrespective of the actual subsequent conduct of the proceeding, this bond was not sufficient to prevent the proceedings from becoming non-adversary upon purchase of the claim by the United States. In *Wood Paper Co.* v. *Heft*, 75 U. S. (8 Wall) 333, suit was brought for infringement of a patent and during the proceeding a settlement was effect whereby the rights of plaintiffs and defendants were joined and merged into one corporation. The question of damages for previous infringements was, however, not settled. This Court held that the suit became non-adversary in spite of the still remaining question of damages.

The implication in the Government's brief (p. 51) that California consented to the loss of her rights in the land in controversy by the Act of May 11, 1854 (Cal. Statutes, 1854-55, C. 43, p. 48, App. *infra* pp. 105-107) is without basis in fact. That Act carefully and clearly specifies that it applies only to lands south of a line drawn across the northern point of the Mare Island highlands. It indicates definitely, not that California consented to any loss of its rights in survey "34" by reason of the Castro grant, but on the contrary that both the United States and California agreed that survey "34" was not covered by the Castro grant and that California had good title thereto.

The fact is, therefore, that the confirmation proceeding was not only collusive and non-adversary in law but also in fact. We submit that the error in the position taken by the Government in its brief is based upon an assumption that the principles for which we now contend do not apply unless there is a showing that the Government was guilty of actual and intended fraud. Many of the cases we have cited above dealt with situations where the parties acted in perfect good faith, but this Court nevertheless found the cases to be collusive and non-adversary simply because of the fact that one person was the real party on both sides. The facts here bring the instant case squarely within this rule.

(2) The second contention of the Government, that even if the proceeding were non-adversary still the ordinary rules of *res judicata* relating to non-adversary proceedings do not apply to decrees of the Board of Land Commissioners, we believe to be adequately answered by the decision of this Court in *United States* v. *Throckmorton, supra.* That was a suit brought by the United States Attorney to set aside and have declared null and void a decree of the Board of Land Commissioners confirming a Mexican claim in California and a decree of the District Court affirming the decree of the Board. The ground was that the decrees were obtained by fraud. This Court held that no relief could be granted because the only fraud relied upon was *intrinsic* fraud, but stated that the result would be otherwise if the fraud were *extrinsic,* as, for example, if by reason of something done by a party there

were no adversary trial. In fact, one of the grounds relied upon in the case as showing fraud was the fact that the attorney representing the United States in the confirmation proceeding knew the claim was fraudulent but did not disclose this to the Board. This Court stated that *if it had been further shown that the attorney was then interested in the Mexican claim,* relief would have been granted. No distinction was made between the decree of the Board and the Decree of the District Court, the opinion being clear that relief from both decrees would lie in the case of extrinsic facts showing non-adversary proceedings.

It is too late in the day for the United States to assert that the proceedings set up by the Act of March 3, 1851 (App. *infra,* pp. 97-104) were non-adversary and non-judicial in character. This Court considered and passed upon the many appeals in these cases even in the face of challenges to the Court's jurisdiction on this very ground. *United States* v. *Ritchie,* 58 U. S. 524. And in considering these cases, this Court has repeatedly stated that the Act of 1851 required California land titles to undergo *judicial* examination, that the Board is a *judicial* body and that the Government is the party interested against petitioner in these cases. *Tameling* v. *United States Freehold, etc. Co.,* 93 U. S. 644; *United States* v. *Throckmorton, supra; Beard* v. *Federy,* 70 U. S. (3 Wall.) 478; *Southern P. R. Co.* v. *United States,* 200 U. S. 354, 358; *Knight* v. *United States Land Association,* 142 U. S. 161, 188; *Grisar* v. *McDowell,* 73 U. S. (6 Wall.) 363; *Botiller* v. *Dominguez,* 130 U. S. 238; *Thompson* v. *Los Angeles Farming, etc. Co.,* 180 U. S. 72. Cf. 7 Ops. A. G. 303. The

Board set up by the Act of 1851 is, in this respect, no different from the Court of Private Land claims established by the Act of 1891, which was a judicial body. *United States* v. *Coe,* 155 U. S. 76.

The Act of 1851 in providing for notice to the United States, for a law agent to represent the United States, for the taking of testimony on behalf of the United States and the presence of the law agent at the taking of all depositions, clearly contemplated an adversary proceedings with the safeguards attendant upon judicial procedure. The right of the United States to appeal to the District Court is most significant in this regard. It was, of course, competent for the Congress itself to determine the matters, but it was also competent for the Congress to set up judicial machinery for this purpose, which it did by the Act of 1851. The process set up being judicial in nature, it is to be governed by the rules ordinarily applicable to all judicial proceedings, among which is, as held by this Court in *United States* v. *Throckmorton,* the rule that the proceeding will not thereafter conclude the rights of others if it was collusive and non-adversary.

But even if the hearing before the Board of Land Commissioners were not judicial in nature, the Government here would not thereby become entitled to use the decree of the Board in the Bissell and Aspinwall case as binding on respondents. The case did not terminate with that decree but was appealed to the District Court where the proceeding was to be heard *de novo* in an ordinary judicial proceeding between adverse parties. *United States* v. *Ritchie, supra.* Such an appeal having been perfected, the force of the pro-

eding as *res judicata* must depend upon the effect the action of the District Court. The cases of *Keller Potomac Electric Co.*, 261 U. S. 428; *Radio Commis-on* v. *General Electric Co.*, 281 U. S. 464; *Postum ereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693; *Ex arte Bakelite Corp.*, 279 U. S. 438, do not hold other-se. They indicate that where an attempt by Act of ongress to confer jurisdiction on this Court fails be-use the proceedings dealt with by the Act do not volve a case or controversy, and it appears to have en the intention of Congress that the legislative urts should in that event continue to have jurisdic-n, they will be held to have such jurisdiction. The ses of *Schmertz Wire Glass Co.* v. *Western Glass Co.*, 8 Fed. 977 (C. C. N. D. Ill.), affirmed 185 Fed. 788 . C. A. 7), and *Colman* v. *Hathaway*, 285 Fed. 602 . C. Mass.), cited on p. 71 of the Government's brief e similar since they involved administrative proceed-gs dealing with the granting of patents which might her be *ex parte* or contested. Cf. *Gandy* v. *Marble*, 2 U. S. 432; *Appert* v. *Brownsville Plate Glass Co.*, 4 Fed. 115, (C. C. W. D. Penna.); *Schmertz Wire ass Co.* v. *Pittsburgh Plate Glass Co.*, 168 Fed. 73 . C. W. D. Penna.); *Schmertz Wire Glass Co.* v. *estern Glass Co.*, 178 Fed. 977 (C. C. N. D. Ill. E. D.). ere, however, the confirmation proceedings *do* pre-t a case or controversy and the constitutional courts have jurisdiction. It is clear that the Act of 1851 es not contemplate or provide for a decision by the ard of Land Commissioners in any case where, upon taking of the proper steps, an appeal would not lie the District Court. And certainly after an appeal

has been properly perfected, the decree of the Board of Land Commissioners cannot be pointed to as effective and conclusive where the decree of the District Court, to which jurisdiction over the case has been transferred, is not binding on innocent persons because of acts done by the parties thereto. The contention of the Government would mean that in a case where, at the time of decision by the District Court, there existed an actual controversy, but where, pending appeal, one side bought out the other, the parties to the proceeding could continue to rely on the District Court decision as binding on innocent persons. We submit that the principles of *res judicata* require the proceeding to be adversary at all times until final termination.

The contention is made by the Government that respondents did not raise a defense of fraudulent collusion in the District Court. (Govt. br. pp. 43-46). This argument again misconstrues respondents' position to be that the officers of the United States were guilty of intentional fraud. Respondents' position is, as we have pointed out, simply that because of the purchase by the United States of the Castro claim, the decree in the confirmation proceeding is not binding upon, and is null and void as to, respondents. That this was the position of respondents in the District Court, as well as in the Circuit Court of Appeals and here, is admitted by the Government on page 44 of its brief.

2. Respondents Were Not Represented in the Confirmation Proceeding.

This same result as that arrived at upon the principles pertaining to collusive and non-adversary proceedings is also reached upon a consideration of the

principles concerning representation of persons not actual parties to a suit.

Third parties were not permitted to intervene in confirmation proceedings—the United States and the claimants alone being entitled to be heard. *United States* v. *Fossat,* 61 U. S. (20 How.) 413; *White's Administrator* v. *United States,* 66 U. S. (1 Black) 501; *Rodrigues* v. *United States,* 68 U. S. (1 Wall.) 582. The intention was, of course, that the United States would represent the public interest and in particular would represent its own previous grantees. It is on this basis that this Court has held that previous grantees of the Government are not "third persons" within the meaning of those words in the Act of March 3, 1851. *Beard* v. *Federy,* 70 U. S. (3 Wall.) 478; *Moore* v. *Steinbach,* 127 U. S. 70; *Knight* v. *United States Land Association,* 142 U. S. 161.

It is familiar law that when a representative in any litigation or proceeding has or acquires an interest in the subject matter of the litigation antagonistic to the interests of those whom he represents, the representation in effect ceases and the persons supposedly represented are not bound, certainly as against the party supposedly representing them, by such judgment or decree as may be entered. *Northern Pacific Railway Company* v. *Boyd,* 228 U. S. 482; *McArthur* v. *Scott,* 113 U. S. 340. See also *Weberpals* v. *Jenny,* 300 Ill. 145, 133 N. E. 62; *Los Angeles County* v. *Winans,* 13 Cal. App. 234, 109 Pac. 640; *People ex rel. Oliver* v. *Knopf,* 198 Ill. 340, 64 N. E. 842; *Northern Pacific Railway Company* v. *Snohomish County,* 101 Wash. 686, 172 Pac. 878; *Sarator* v. *Newberry Land and Security Co.,*

104 S. C. 184, 88 S. E. 467. Cf. *Litchfield* v. *Goodman*, 123 U. S. 549.

Persons not parties to a proceeding are concluded under the rule of representation when and because persons who are parties have identical interests which self interest will require them to assert. If that identity of interest is lacking, the safeguards are withdrawn and under the above cases a person not a party will not be bound.

The situation at bar comes squarely within this rule since the United States acquired and actively asserted an interest hostile to respondents. In such circumstances the presumption of representation falls and respondents are not concluded. Certainly the United States cannot at the same time assert that it represented California in the proceeding and set up and claim under an interest which it had in that proceeding hostile to the interest of California.

3. The United States Held Legal Title in Trust for California and Can Not Use a Proceeding in Which it Appeared as Holder of that Title to Establish an Adverse Interest in Itself.

A third ground exists upon which the United States is precluded from now relying upon the confirmation proceedings as being conclusive on Respondents. This is that the United States held legal title to the property in trust for California and can not use a proceeding in which it appeared as holder of that title but in which it also had an adverse interest, to establish that adverse interest against California.

The Swamp Land Act of 1850 was a grant *in praesenti* to the states of the unsold swamp lands within

their borders, and the equitable right of California to the land in controversy was vested at the time of that Act. *Wright* v. *Roseberry,* 121 U. S. 488, 509; *Tubbs* v. *Wilhoit,* 138 U. S. 134; *Rogers Locomotive Works* v. *Emigrant Co.,* 164 U. S. 559, 570; *Michigan Land & Lumber Co.* v. *Rust,* 168 U. S. 589, 591; *Work* v. *Louisiana,* 269 U. S. 250.[5] The equitable rights which immediately passed under this Act amounted to an inchoate title, even though the particular lands involved had not yet been surveyed and ascertained to be swampy and overflowed. *Rogers Locomotive Works* v. *Emigrant Co., supra,* p. 570; *United States* v. *Minnesota,* 270 U. S. 181. Where inchoate rights of this sort to public land have been found to be vested under Acts of Congress, this Court has uniformly decided that the title to the land was held by the United States in trust for the possessor of the rights. See, for example, *Orchard* v. *Alexander,* 157 U. S. 372, 383; *Knapp* v. *Alexander Co.,* 237 U. S. 162; *United States* v. *Anderson,* 194 U. S. 394; *Payne* v. *New Mexico,* 255 U. S. 367, 371; *Cornelius* v. *Kessel,* 128 U. S. 456, 460-1; *Benson Mining Co.* v. *Alta Mining Co.,* 145 U. S. 428, 432. A similar decision has resulted even where the inchoate rights were received through a gift from the United States rather than a sale (*United States* v. *Anderson, supra*) and this rule is applicable to the inchoate rights ———).

[5] Contention is now made by the Government that Survey "34" was claimed under the Castro grant in 1850 so that the Swamp Act had no application to that property even though the Castro grant was in fact invalid or did not in fact cover the property. Neither factually nor legally is there any substance to this argument as we shall demonstrate in considering that particular point (*infra,* pp. 73-79).

received by the states under the Swamp Land Act (*Brown* v. *Hitchcock,* 173 U. S. 473, 476; *Michigan Land & Lumber Co.* v. *Rust, supra.*).

Under the rule of these cases the United States, at the time of the Land Commission proceedings, held the legal title to the land here in controversy in trust for the State of California. The United States, holding legal title in trust for the State, could not, in equity, advance its own interests to the prejudice of the rights of the State by purchasing an adverse interest in the property and establishing that interest by litigation against itself as representative of the equitable interest of California. One in the position of a trustee or agent is not permitted to acquire a dominant interest or otherwise make profit out of dealings with the property. *Michoud* v. *Girod,* 45 U. S. (4 How.) 503, 522; *Chicago etc. Railroad* v. *Des Moines etc. Railroad,* 254 U. S. 196, 220. This disability is not dependent upon proof of actual fraud but is an absolute disability arising out of the high degree of duty and loyalty required of trustees and agents by courts of equity. Bogert, Trust and Trustees, Vol. 3, secs. 485, 543.

It was upon this ground that the court below put its decision refusing to recognize the Confirmation decree as *res judicata.* The Government seeks to meet the argument by asserting that the United States was not an active trustee in the strict sense. (Govt. br. pp. 52-58.) However the disability relied upon by the court below is not confined to strict trustees. As Lord Loughborough stated in *Whichcote* v. *Lawrence,* 3 Ves. Jr. 740, 750:

> * * * he who undertakes to act for another in any matter, shall not in the same matter act for himself.

This rule has broad application to all who act as gents or in any representative capacity whatsoever. *Michoud* v. *Girod, supra.* It is specifically applicable o both vendors and vendees and neither may buy up nd assert a title adverse to the other unless it be for he purpose of mutual protection. *Warvelle, Vendors,* d ed. sec. 186. Whether or not the United States was ere a trustee in the strict sense is entirely immaterial o the application of this doctrine.

In connection with this point the Government again rges (br. 58-60) that California and Respondents are stopped by the California cession act (Calif. Statutes, 854-55, C. 43 p. 48; App. *infra* pp. 105-107). As we ave pointed out above, that act carefully excludes the and in controversy. We submit that its true effect, vhen taken in connection with Attorney General Cush-ng's opinion (8 Ops. A. G. 443) is to establish an agree-nent between the United States and California that California had good title to Survey "34" and that the Castro grant had no relation thereto.

A state which has received equitable rights to land nder the Swamp Land Act may not be arbitrarily dis-ossessed thereof by the Government. *Michigan Land & Lumber Co.* v. *Rust, supra.* Those rights may be ter-minated only by due process of law, implying notice and earing. *Brown* v. *Hitchcock, supra; Orchard* v. *Alex-nder, supra.* Although the relationship which exists etween the United States and its Swamp Act grantees

might not be one of a strict trust in the technical sense, that relationship is certainly of a kind to come within the rule here contended for and to forbid the United States from terminating the rights of a state by buying up an adverse interest and asserting it in a proceeding against itself as a holder, for the benefit of the state, of the legal title.

B. The Confirmation Proceeding Has Not Been Made Conclusive by Laches.

In two places in the Government's brief (pp. 60-65; 72-74) it is argued that the confirmation proceding may be relied upon by the United States as conclusive on Respondents because Respondents have been guilty of laches. The basis of this argument is an assertion that respondents have stood silently by without making known their claim and permitted the United States to make large expenditures on the faith of the Confirmation Decree.

We cannot believe that in the face of the present record the Government can be serious in this contention. The United States did not commence to build on Survey "34" until 1915. (See stipulation to that effect in Mandamus record, p. 63 of Ex. J, original, and see full discussion of this whole matter in argument on adverse possession, *infra* pp. 81-90.) As a matter of fact the land was not filled in until after 1914 and the fill had not extended far even by 1917. (R. 806. See Deft's. Ex. 3, App. *infra* p. 120, which is the drawing prepared by the Navy Department in 1914 upon which bids were submitted for the filling of that part of "34" closest to the upland.) Prior to that time the ejectment suit

by respondents' predecessor had been brought and dismissed (*Sawyer* v. *Osterhaus, supra*) and during all of the time that the Government was building on this land the proceedings were pending which were commenced in 1912 by California before the Interior Department for a patent and in which, after the stimulus of three writs of mandamus, the patent was issued to California in 1928. (R. 33-35, 543-551; Pltffs Ex. J, pp. 35-44, 48-57, original.)

Certainly it cannot be said that Respondents stood by silently in a way amounting to a disclaimer of title while the United States spent large sums in improvement (*Kirk* v. *Hamilton,* 102 U. S. 68, 78-79, quoted in Government's br. pp. 72-73) or passively looked on while money was being spent without making known their claim (*Wendell* v. *Van Renselaer,* 1 Johns Ch. 344, 354, quoted in Government's brief p. 73). The United States saw fit in 1914 to take possession of the land, erect a fence, and commence to improve the property, in the face of the fact that respondents were and had been for many years actively asserting their ownership. When the proceedings which were started in 1912 finally resulted after 16 years in the issuance of a patent to respondents, the Government cannot claim laches on the basis of its improvements during that time.

The truth is that from 1873, when the officers of the Government for the first time, as it would seem, decided that the swamp lands north of the Island should be a part of the Navy Yard and attempted to take possession by building two shacks on Survey "569", to date the United States has at all times known of the title of Respondents and known that it was being actively as-

serted. Warning was given in 1873 to the Commandant of the Navy Yard to refrain from taking sand from the land. (R. 783.) Formal protests against the Freeman survey were filed with the Surveyor General and with the Commissioner of the General Land Office in 1879. (R. 583-593.) By 1905 proceedings were pending in court. (R. 535.) Throughout this entire period respondents have continuously asserted title to this property, to the Government's knowledge. It is impossible to find laches on these facts.

The point to which the Government's argument of laches is directed is not entirely clear. It is included in the brief as part of the argument on the conclusiveness of the confirmation decree. Yet no final decree was entered in that proceeding until just prior to the commencement of this suit[6] and it is obvious that the conclusiveness of that decree cannot depend on laches nor can it be said by the Government that they improved the property in reliance on any final decree in that proceeding. If there is any laches here it is on the part of the parties to the confirmation proceeding in letting the case go for 73 years without a final decision.

Argument is made by the Government that respondents should have resorted earlier to the series of mandamus suits by which they secured a patent. If it be intended by this to urge that the patent is void because

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[6] The Government argues (br. 35-39) that there existed a valid and subsisting decree in 1857. However, the *nunc pro tunc* decree in 1930, signed on motion of the Government, states that no decree had been entered and that the case was still pending and undecided. (R. 290.) The Government will certainly not be heard now to urge the contrary.

of laches in securing it, we submit that such a contention should have been made in the mandamus suit which ordered the patent issued. Moreover it would be a most surprising and novel rule if the Government could defeat a person's right to a patent on the ground of laches because of a delay in bringing mandamus to compel a Government officer to perform a ministerial duty.

In any event it is clear that there exists here no basis in fact for imputation of laches and the Government's contention in this regard is not well taken.

IV.

The Swamp Land Act Applied to the Land in Controversy.

Assertion that the lands in controversy were withdrawn from the operation of the Swamp Land Act because claimed in 1850 under a Mexican grant rests, we submit, upon a misconception of both the facts and the law.

It rests upon a misconception of the facts because in 1850 the land in controversy was not claimed under a Mexican grant. The grant to Castro was simply of "Mare Island". As we have shown (*supra* pp. 31-37) those words under Mexican law covered only the area above highest high tide and had no application to Survey "34". Nothing had occurred in 1850 to give basis to any larger interpretation of the boundaries of the grant, and there is no evidence in the record that anyone suggested before 1852 that any swamp lands were included. Were, then, the application of the Swamp Land Act to be tested, as the Government contends, by what was claimed under Mexican grants in 1850, the

conclusion would be that the land here was subject to the Act.

With the test proposed by the Government, however, we take definite issue and submit that it is entirely incorrect as a matter of law. The argument that lands claimed under fraudulent Mexican grants, or claimed under valid Mexican grants not in fact covering the lands, were not within the application of the Swamp Land Act is based on *Newhall* v. *Sanger,* 92 U. S. 761. The analysis of the holding in that case made by the Government to support this contention is, however, far different from the analysis of the holding of the same case made by *this Court* in the later decision of *Lockhart* v. *Johnson,* 181 U. S. 516. In *Newhall* v. *Sanger* land was claimed under the Pacific Railroad Acts of 1862 and 1864. At the time of the passage of those acts the land was within the boundaries of an alleged Mexican grant, and proceedings for the confirmation of this grant were then pending before this Court. This Court held in the *Newhall* case that by reason of the Act of March 3, 1851 (Ch. 41. 9 Stat. 631, *infra* pp. 97-104) the land claimed under the Mexican grant was withdrawn pending decision of the confirmation proceeding and that consequently it did not pass to the Railroad under the Pacific Railroad Acts. The Government interprets this holding as being to the effect that lands claimed under a Mexican grant were, even prior to the Act of March 3, 1851, reserved from disposal by the United States as public lands. Upon this construction of *Newhall* v. *Sanger*, and a like construction of the case of *United States* v. *McLaughlin,* 127 U. S. 428,

which follows it, the entire contention of the Government under this point is based.

This construction put by the Government on *Newhall* v. *Sanger* is, however, entirely contrary to the meaning and effect of that decision as enunciated by this Court in the later case of *Lockhart* v. *Johnson, supra.* In that case lands in New Mexico were claimed under a location made under the mining laws at a time when a proceeding before the Court of Private Land Claims set up in 1891 was pending for the confirmation of a Mexican grant to the same property. The confirmation proceeding was terminated by a holding that the property was outside the limits of the grant, but this termination occurred subsequent to the location of the lands under the mining laws. The contention in that case was that the mining location was inoperative because the lands were withdrawn from entry until final determination of the Mexican claim. This Court held to the contrary on the ground that there was no statute in existence withdrawing the land, and on the further ground that the Treaty of Guadalupe Hidalgo in no way operated as a withdrawal of lands claimed but not included under a valid Mexican grant. The opinion stated (pp. 522, 523):

> The mere fact that lands were claimed under a Mexican grant, when such grant did not in truth cover them, would not by virtue of any language used in the treaty operate to reserve such lands from entry and sale. * * * Whatever reservation there is must be looked for in the statutes of the United States, * * *

This Court then considered the case of *Newhall* v. *Sanger*, saying (p. 525):

> Nor does the case of *Newhall* v. *Sanger*, 92 U. S. 761, 23 L. ed. 769, apply. In that case it was held that lands within the boundaries of an alleged Mexican or Spanish grant which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the railroad, were not embraced in the congressional grant to the company. The decision went upon the ground that the legislation of Congress had been so shaped that no title could be initiated under the laws of the United States to land covered by a Spanish or Mexican claim until it was barred by lapse of time or rejected. *The act of March 3, 1851 (9 Stat. 631, 633, sec. 13), which provides for the presentation of claims under Mexican grants in California to the commission established by the act, was referred to by the court, and it was held that by reason of its provision the lands were not public lands under the laws of the United States* until the claims thereto had been either barred by lapse of time or rejected. *The 6th section of the act of 1853, March 3 (10 Stat. 244, 246), was also referred to as expressly excepting all lands claimed under any foreign grant or title.* (Emphasis supplied.)

From this statement it is apparent that lands claimed to be but not actually covered by a valid Mexican grant are not withdrawn unless there was in effect, at the particular time involved, a statute providing for such withdrawal. The holding of *Lockhart* v. *Johnson* in this regard and the interpretation there made of the decision of *Newhall* v. *Sanger* was followed and em-

phasized in *Lane* v. *Watts,* 235 U. S. 17. This Court specifically said in that case (p. 22): "The mere fact of a claimed Mexican grant did not reserve the lands covered by it".

The attempt of the Government to justify its interpretation of *Newhall* v. *Sanger, supra,* by distinguishing *Lockhart* v. *Johnson, supra,* and *Lane* v. *Watts, supra,* on the ground that they related to lands in New Mexico is entirely without merit. The opinions themselves indicate that this Court was enunciating only one rule of law consistently applied in all three cases, and was not enunciating two different rules of law, one for New Mexico and one for California. The statements of this Court in *Lockhart* v. *Johnson* concerning *Newhall* v. *Sanger* were an interpretation of the effect of that decision and it may not now be cited, as the Government seeks to do, as authority for a rule of law which this Court states definitely it did not adopt in the *Newhall* case.

The Government also relies on the decision of the Supreme Court of California in *Shanklin* v. *McNamara,* 87 Calif. 371. That case, however, is plainly in conflict with the later decision of this Court in *Carr* v. *Quigley,* 149 U. S. 652, and therefore does not represent the law. If the decision in *Shanklin* v. *McNamara* were the law, the Swamp Land Act would have applied to no land at all within the State of California, for it appears that the entire State was within the out boundaries of a claimed Mexican grant. *Carr* v. *Quigley, supra,* at p. 660. And insofar as *Shankin* v. *McNamara* is relied upon here to establish that the mere fact of a claimed Mexican grant withdrew the lands covered

by it, it conflicts with the law as established by this Court in *Lockhart* v. *Johnson* and *Lane* v. *Watts*.

To support its assertion that the Swamp Land Act had no application to the land in controversy because claimed under a Mexican grant, the Government must show that an Act of Congress was in force in 1850 withdrawing lands so claimed. But no such statute was then in existence. Of course, title under a valid Mexican grant dates back to the time of the grant by the Mexican authorities and would give a title paramount to the rights passing under the Swamp Act. *City and County of San Francisco* v. *Leroy*, 138 U. S. 656; *United States* v. *Coronado Beach Co.*, 255 U. S. 472. But an invalid grant gives no such title and in no way operated to prevent the lands from passing under the Swamp Act.

Any different conclusion would not only be contrary to the law as settled by this Court, but also would be inadmissable as a practical matter. The Swamp Land Act was a grant *in praesenti* in 1850 and its scope is determined by the conditions then existing. At that time it was utterly unknown what lands were covered or claimed under Mexican grants. If only the lands actually covered by a valid Mexican grant, are excepted from the operation of the Swamp Land Act, determination of the scope of the Swamp Land Act in California may be arrived at with certainly from the decrees of the Board of Land Commissioners and the Courts. If, however, the application of the Swamp Land Act is to depend upon whether or not there existed in 1850 a claim to the land under a Mexican grant, titles to California swamp lands will always be subject to the possibility that some one will assert that in 1850 the property was

claimed under a grant, even though the claim was afterwards abandoned without ever being presented to the Board.

We submit that in 1850 the State of California received equitable title to the land in controversy under the Swamp Land Act and that this title may be defeated only by proof that the land had previously passed into private ownership under a valid Mexican grant.

V.

The United States Has Acquired No Title by Adverse Possession.

Strong reliance is now placed by the United States on the doctrine of adverse possession, although it is admitted (Govt.'s br. p. 22) that the point was not even argued by Government Counsel before the Circuit Court of Appeals. We submit that not only is there no justification for the argument on the facts, but also the claim of adverse possession will not lie legally in the situation here presented.

On the question of adverse possession, we assume that evidence will mean more than conclusions and that the constant repetition in the Government's brief of the statement that the United States has been in possession of the property since 1853 will not establish the assertion in the absence of proof thereof in the record. The constant use of this date in the Government's brief is interesting and important because it illustrates how an incorrect allegation made in the bill of complaint filed herein by the United States (R. 10) has crept into the findings of the District Judge (R. 171) and has now been perpetuated in a brief filed before

this Court, all because of lack of consideration of the facts as shown in the record.

The actual date upon which Commander Farragut took possession of the *highlands* of Mare Island was September 16, 1854, as is proven by his Log Book introduced into evidence by the Government. (R. 769.) Yet the District Court below finds as a fact that "ever since September 16, 1853, the United States has occupied the lands". (R. 171.) The reason for this will be clear if this Court will compare the Findings of Fact word for word with the Government's bill of complaint. It will be seen that the first half of the Findings are a verbatim repetition of the Bill. The latter part of the Findings are a repetition of the contentions made by respondents before the District Court, prefaced in each case by a negative. Obviously no painstaking or even reasonably thorough examination of the evidence in the record was the genesis of the Findings. The District Judge very apparently made up his mind that the Government was right and signed the Findings presented to him without comparison with the evidence. As a consequence, all of the allegations of the bill of complaint, the incorrect as well as the correct, are transmuted into determined facts for the edification of the appellate tribunals.

We realize that it is a harsh thing to suggest that a District Judge has adopted findings of fact without adequate consideration of the evidence. On what is disclosed here, however, we feel that this suggestion is compellingly called for, particularly when it is borne in mind that it was this same Judge who signed the *nunc pro tunc* decree in the Confirmation proceeding, a de-

cree which on the face of it showed that the proceeding was non-adversary and which contained a paragraph unnecessary to the proper entry of such a decree and obviously inserted in an attempt to foreclose the rights of persons not parties to that proceeding.

Certainly in an equity case with this background, this Court will not permit its decision to rest on the findings of the District Court, but will wish to examine the evidence properly introduced to determine for itself the true factual situation presented. Even the cases cited by the Government in support of its assertion that the findings should have been accepted by the Circuit Court of Appeals and should be accepted by this Court indicate the importance placed by this Court upon whether or not there was a careful and painstaking consideration of the evidence by the District Court. See *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451, 455.

Consideration of the evidence in the record clearly establishes, we submit, that the United States did not take possession of Survey "34" until 1914 when they fenced it and began to fill it in. Commander Farragut, as we have pointed out, first took possession of the highlands of Mare Island on September 16, 1854. Although the United States had purchased Bissell and Aspinwall's claim more than a year and a half before (R. 302-308) it had been necessary under the appropriation act to secure aproval by the Attorney General of the Government's title before construction of the Navy Yard could commence. After consideration of the matter, Attorney General Cushing gave his opinion to the effect that California had good title to the tide

and overflowed lands of Mare Island by reason of its ownership of tide lands and by reason of the Swamp Land Act, and required as a prerequisite to the spending of money on the project that a relinquishment be secured from California of her rights to the swamp and overflowed lands on the Island. (8 Ops. A. G. 443.)

Upon receipt of this opinion the Secretary of the Navy wrote to the Governor of California and as a result thereof California passed the Act of May 11, 1854, (Calif. Statutes 1854-55, pp. 48-49, App. *infra* pp. 105-107) transferring to the United States the title and interest of the State in such portions of Mare Island as were overflowed, beach or swamp lands on the Eastern shore of the Island "from the Southern point thereof to a parallel intersecting the Northern point of the highlands."

The northern limit so definitely specified in the Act without any doubt excluded from the transfer the lands now in question and indicated clearly to the United States that California intended to retain its title to these lands, as recognized by Cushing. It is to be presumed that this Act was accepted by the Attorney General as being sufficient, for shortly thereafter Commander Farragut took possession.

Consequently the first point we wish to make is that the circumstances leading up to the original taking of possession of the Island were such as to draw a clear line of demarcation between the Island itself and the swamp lands to the north which are now in controversy. Commander Farragut went upon the Island under what amounts to an understanding between the

United States and the State that the State had and was retaining title to the land north of the parallel intersecting the northern point of the highlands.

That this was the understanding at the time is, we believe, clearly indicated by other circumstances. The very deed under which the United States took the property conveys Mare Island "as recently surveyed by the board of officers of the United States". The survey so referred to included only the highlands. (R. 842-843.) In view of this fact no reliance could have been placed by the Government on the additional words in the deed "including all the tule or low land and marsh belonging to the same" because it evidently referred to something other than and in addition to Mare Island, and the title of the Government's grantors as received by mesne conveyances from Castro was, to the Government's knowledge, limited to the Island. See *In re Wasson*, 54 Cal. App. 269, 201 P. 793.

Moreover neither Commander Farragut nor any of his successors for almost 20 years made any attempt to assert possession over these swamp lands. Farragut, it is true, hauled some sand up from the beach (R. 772-773) but just where that beach was located is not shown. Also Farragut on June 4, 1855 placed a target on the tule lands for the USS Massachusetts to try out its new guns on. (R. 774.) This target was only about a quarter of a mile north of the highlands (R. 592) yet Farragut speaks of the target as being "acros the Tuly on the Northern end of the Island". (R. 774.) Obviously Farragut had no understanding that the Island stretched 7½ miles north of the highlands. Furthermore the acts of taking sand from the beach and set-

ting up a target to shoot at are not such acts as indicate an intention to assert title and possession of property, particularly when the lands were as wild and unsettled as were these swamp lands in 1855. See *In re Wasson, supra; Litchfield* v. *Ferguson,* 141 Mass. 97, 6 N. E. 721; *Parker* v. *Wallis,* 60 Md. 15; *Price* v. *Brown,* 101 N. Y. 669, 5 N. E. 434.

That Farragut had no intention of asserting possession of Survey "34" is indicated by the fact that during his first few years on the Island, the swamp land was surveyed by private parties three times without protest from him. (R. 758-759, 591-592½, 383-388.)

California, apparently acting on the basis of the understanding above referred to, sold the land comprised in Survey "34", issuing its patent on March 18, 1857. At that time there was nothing to indicate any intention on the part of the United States to claim this land nor was anything done by the United States to suggest any such intention for 16 years or until 1873.

In 1863 the Coast and Geodetic Survey made a most accurate and detailed survey of the Island and the swamp lands. (Pltffs. Ex. L 25, relevant parts reproduced app. *infra* p. 117.) This map sets out clearly the many buildings on the highland but shows Surveys "34" and "569" as still entirely in their natural state without occupation or improvement by structures of any kind.

Ten years later in 1873, however, the Navy Department decided to formulate plans for the enlargement of the Mare Island Base and appointed a Board for that purpose. (R. 483-485.) It is in connection with these plans and at this time that the Navy Department

first decided that it desired the swamp lands north of the Island. And being far from the events of 1854, the officers of the Government concluded that they already had good title to this property. Apparently learning of the attitude of the Government, the then holder of the swamp land title to "34" immediately made it known to the officers that he claimed title. (R. 488.) Whereupon on September 29, 1873 the Commandant of the Navy Yard sent out a force of men to construct two cabins, one about a mile north of the highlands and the other at the northern end of survey "569", 7½ miles from the highlands. (R. 776-778.) Also it would seem that some iron stakes were put up at the northern end of Survey "569". (R. 719.) These stakes, of course, were many miles north of Survey "34".

It appears that the shacks were soon abandoned, however, and no further buildings were constructed on the swamp. *San Francisco Savings Union* v. *Irwin, supra.* In 1876 the Coast Survey made a chart of the Swamp Lands north of Survey "34". (Pltffs. Ex. L 26, original.) This chart shows no occupation of any kind of Survey "34". In 1877 Freeman made his survey of the area. (R. 711-720.) The only occupation or improvement noticed by him was a fisherman's cabin. (R. 715.) Although he found the iron stakes standing and refers to them, he makes no mention whatsoever of the continued existence of the shacks erected by the Government in 1873. (R. 719.)

In 1886 the Coast and Geodetic Survey made a resurvey of San Pablo Bay. Pltffs. Ex. L 27, relevant parts reproduced, App. *infra.* p. 118) This shows all of the Naval Yard development to be still confined to

the highlands, Survey "34" still being in its natural swampy state without occupation or improvement of any kind. Targets are shown out in the bay but no targets are indicated as being located on Survey "34".

In 1886, Justice Field in *San Francisco Savings Union* v. *Irwin, supra,* considered all of the circumstances hereinabove related and held that they did not show any adverse possession. After that decision, and particularly after affirmance by this Court in 1890, the Government appears to have given up all thought of occupying or asserting title to the swamp lands north of the Island. The holder of the Swamp Land title to Survey "569", which was directly involved in the Irwin case, took possession and built extensive levees including not only Survey "569" but also most of Survey "34". (R. 597, 599, 778, 789, 850 and map opposite R. 614.) The land comprised within these levees was by that means reclaimed and thereafter cultivated. (R. 599, 778.) The privately built levees and the extent of the land included within them are clearly shown on a map prepared by the United States Geological Survey in 1902. (Pltffs. Ex. L 31, the relevant portions of which are reproduced in the app. *infr.* p. 119.) The land enclosed in the levees is there shown as a separate island entitled "Island No. 1."

Thus we see that the first actual possession, reclamation and use of the land was the work of private parties. These private parties thereafter remained in possession of the land until 1914 when, following the decision in *Sawyer* v. *Osterhaus, supra,* to the effect that respondents' predecessors had no right to bring ejectment, the Government took possession of the property

and erected a fence at the northern boundary of Survey "34". (R. 623.) It is true that during this period a road and a telephone line were built along the top of one of the levees and into the Navy Yard, but in view of the actual occupation of the land by private parties it is clear that this use was permissive rather than adverse. (See Deft's Ex. 3, a photostatic copy of which is reproduced in the appendix *infra*, p. 120, and Pltffs. Ex. L 29, original.) Also it appears that at some time during this period, dirt excavated on the Island was dumped over the bank onto the swamp land, covering a small area to the depth of perhaps 6 inches. (R. 765.) To base adverse possession on this would be, of course, preposterous.

After taking possession in 1914, the Government proceeded to build extensively on the property. Before doing this, however, it was necessary to reclaim the land not included within the levees built by the private parties. This was done by the building of an additional levee and the letting of contracts for filling. (See Deft's. Ex. 3, reproduced in the appendix *infra*, p. 120.) The extent of the construction on this property, which has all occurred after 1914, is indicated by Defendant's Exhibit 6, a map of the Navy Yard as of June 30, 1926, the relevant parts of which are reproduced in the appendix, *infra*, p. 121.

This is the history of the lands in controversy as told by the evidence herein and we utterly fail to see any ground upon which the Government may urge adverse possession. The Government's reliance seems to be put on Plaintiff's Exhibit G. G. (original) and par-

ticularly upon the statement contained therein that in 1858 the steam engineering building, costing $370,000, was erected partly on the lands in controversy. Plaintiff's Exhibit G. G. is a list prepared in 1921, under the direction of Captain Carl Carlson of the Civil Engineering Corps, for use by the Government in the proceedings brought by California for a patent to Survey "34". (R. 785-786.) Captain Carlson had been stationed at Mare Island twice, once in 1916-1917 and again from 1925 to 1928. (R. 762.) He states that the list is prepared from the records but he does not tell us what records nor where it was prepared. (R. 785.) It is evident that it was not prepared at Mare Island for he was not at the Island in 1921. He endorses it only as "substantially correct to the best of my knowledge". (R. 785.) We submit that adverse possession is not to be based upon the statements of such a document unless those statements are definitely substantiated by independent evidence.

Not only does the evidence not substantiate Captain Carlson's list, but also it goes further and shows that Captain Carlson has included improvements not in any way located on Survey "34". The Steam Engineering building, which the Government particularly specifies (br. 23) was built entirely south of the southerly boundary of respondents' property as is conclusively shown by the record. (R. 57; Pltffs. Exs. L 25, L 27 and Defts. Ex. 3, reproduced *infra* pp. 117, 118, 120; Pltffs. Exs. L 18, L 23, L 24, L 26, JJ, KK and Defts. Ex. 28, original.) Even the map which accompanies the list prepared by Carlson shows that the engineering build-

ing was not on Survey "34". (Pltffs. Ex. G. G. original.) The fact is that the engineering building was fifty feet distant from the southern boundary of Survey "34". (R. 783.)

Carlson also includes a road along the beach (1855), a water main (1875), and the drilling of a well (1883). No evidence is found in the record substantiating any of these items. We have already referred to the artillery target in 1855 and the shacks built in 1873. Carlson also lists targets in 1886 although the Geodetic Survey map shows that they were not on Survey "34" at all but out in the Bay. (Pltffs. Ex. L 27, reproduced appendix, *infra* p. 118.) Although Carlson states "Spoil area, 1898 and later" it appears that even the portion of survey "34" not in the possession of private parties was not enclosed so as to become a spoil area until 1914 (See Defts. Ex. 3, reproduced appendix, *infra* p. 120) as is admitted by Carlson himself later in the list when he specifies that the "East levee" was not built until 1914. No actual construction on, or improvement or occupation of, survey "34" prior to 1914 is indicated by any substantive evidence introduced in this case, and the maps of the area demonstrate that Survey "34" was in its original wild state, except as improved by private parties, until 1914.

On page 24 of the Government's brief it is stated that the record does not show that any attempt was made to reclaim the land except by the Government. Of course the fact is as shown above that the land was diked and reclaimed by the owners of Survey "569".

In the light of all of the evidence it is apparent that the Government took no possession whatever of "34" until 1914, and certainly not that actual, visible, exclusive and continuous possession required to create a bar under the Statute of Limitations. *Ward* v. *Cochran,* 150 U. S. 597. The California Statutes are specific as to what acts are necessary to constitute adverse possession. Even if it be thought that the Government held a written instrument covering Survey "34" (but see remarks on this point in discussion of constructive possession, *infra* pp. 90-92) the requirements of California law are not met by the evidence disclosed here. Calif. Code of Civil Procedure, secs. 322, 323, App. *infra,* pp. 107-108. And certainly if, as we contend the deed under which the United States took Mare Island did not cover Survey "34" the more stringent provisions applicable in that case must defeat the claim of adverse possession here. *Ibid.* secs. 324, 325, App. *infra,* pp. 108-109.

After 1914 the Government was in possession, but the proceedings commenced in 1912 for a patent were then pending and were not terminated until issuance of the patent in 1928. The Government, of course, could not base adverse possession on occupation during that period, particularly when the long delay was occasioned by the refusal of officers of the Government to perform ministerial duties making it nec ssary for respondents to bring three mandamus suits.

The implication on p. 27 of the Government's brief that even though no actual occupation of Survey "34" was proved, still the Government might secure title by adverse possession because they occupied the Island it-

self under a written conveyance referring to swamp lands, is not sustainable. The rule to the effect that occupation of part of a tract of land described by a deed will be considered as occupation of the whole if claim is made to the whole and no one else is in possession, applies only where the boundaries of the property are set out with such definiteness in the deed that one reading it may be apprised of the exact area covered. If by reason of vagueness or uncertainty, the description given is such that positive identification of the land not occupied may not be reasonably reached therefrom, the rule is without effect. *Clark* v. *Courtney*, 5 Pet. 318; *In re Wasson, supra; Black* v. *Tennessee Coal Co.*, 93 Ala. 109, 9 So. 537; *Jackson* v. *Woodruff*, 1 Cow. (N. Y.) 276. In the case of *In re Wasson, supra,* the Court of Appeals of California held that there was no constructive possession of a sand bar where only the upland was occupied and where the deed although referring to and including a sand bar, did not specifically describe it by metes and bounds.

This is certainly the situation here. The deed under which the Government claims is of Mare Island "as recently surveyed by the board of officers of the United States sent to California for the selection of a site for the Navy Yard there". (R. 303.) The survey which is thus made the controlling part of the description (see Civil Code of California, sec. 2077 C), showed the Island as consisting only of the highlands and did not include any of the swamp lands lying to the north. (R. 842-843.) Although the deed goes on to say "including all the Tule or low land and Marsh belonging to the

same or which has ever been reputed or claimed to belong to the same", (R. 303) it is apparent that this contemplated something in addition to that which was comprised within Mare Island itself. The Government's grantors had no rights which they could convey other than to the Island itself because the Castro grant and the mesne conveyances to them were limited to the Island. This fact was, of course, known to the Government at the time, since the Confirmation proceeding was then pending. Certainly, then, it cannot be said that the Government was holding possession of the uplands under a chain of title definitely and positively including the particular swamp lands comprised in Survey "34". That in determining constructive possession the entire chain of title relied upon will be considered, see *In re Wasson, supra.*

Moreover, completely ignoring the Sloat Board survey, it is obviously impossible to determine from the description in the deed what swamp lands are covered thereby since no definite boundaries are given. And when it is considered that Attorney General Cushing held that the deed did not give title to the United States to overflowed lands, we submit that it cannot properly be said that the possession by the Government of the uplands was under a deed so clear as to give adverse rights to any particular tract of swamp land without actual possession thereof. Furthermore the Government is prevented from relying upon the doctrine of constructive possession by the fact that the land was actually occupied by private parties from 1886 on, without protest from the United States.

No adverse possession, then, is maintainable on the facts in this case. Even if it were otherwise, however, we submit that as a matter of law adverse possession would not lie. It is settled by this Court that the running of a state statute of limitations with regard to adverse possession will not commence against a grantee of the United States until patent has issued. *Redfield* v. *Parks,* 132 U. S. 239; *Henshaw* v. *Bissell,* 85 U. S. 255, *Northern Pacific Railway* v. *Slaght,* 205 U. S. 122. The construction put upon the California statute by the Supreme Court of the State is the same. *Gardiner* v. *Miller,* 47 Cal. 570; *O'Conner* v. *Fogle,* 63 Cal. 9; *Gage* v. *Downey,* 79 Cal. 140, 21 p. 527, 855. This is for two reasons, first, that until the patent is issued, the grantee has no right to bring an action at law in the courts of the United States, and second, that statutes of Limitation do not run against the Government. It is no answer to say, as the Government does (br. 27-28), that respondents at all times had the equitable remedy of mandamus, which after the securing of three successive writs, finally brought about the issuance of a patent. Adverse possession is based upon a limitation put by statute on the bringing of possessory actions, and the running of the statute can commence only when the cause of action accrues. The right to bring such a possessory action did not accrue to respondents here until 1928 and, as settled by the above cases, the Statute of Limitations could commence to run only as of that date.

Also another legal principle prevents adverse possession here. The question of the right of the Government to secure rights against its citizens by adverse posession has arisen very infrequently. The leading case

recognizing such a right is *Stanley* v. *Schwalby*, 147 U. S. 508. The greatest objection to the securing of title by the United States through adverse possession considered by the court there was that the United States as a sovereign could not be sued. This Court answered that objection, however, by stating that in the case of the Government, protest against the occupancy and application for redress in the proper quarter would be quite as effectual in destroying the presumption of the right to possession or of the abandonment of a claim as would be a suit in the case of a private intruder. Under this holding no adverse possession in the Government could be supported here even if the respondents had at all times possessed a patent to the lands. Protest was made by respondents' predecessors every time the Government took any step looking to the assertion of title over this property, and the Government was at all times cognizant of the fact that respondents' rights had not been abandoned but on the contrary were being actively asserted.

We conclude that the United States has not established any title by adverse possession.

CONCLUSION.

It has taken more than a quarter of a century of constant litigation for respondents to get their rights before this Court for final determination. At the time this litigation was started, the land in controversy was unimproved, part of it being enclosed in dikes and farmed by private parties and the rest swamp lands in their original state covered with tule and salt grass. While the litigation has been pending, the United

States has taken the property, added it to the Navy Yard and has, as it asserts, spent two million dollars in developing the lands. Now in the conclusion to its brief the United States suggests that these expenditures made *pendente lite* should bear an influence on the decision to be reached by this Court. We believe that ordinary considerations of justice and equity entitle respondents to a decision on the facts as they existed when the litigation was commenced and we are confident that this Court will consider the case on that basis.

It is submitted that the decree of the Court below was right and should be affirmed.

Respectfully submitted,

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APPENDIX.

Act of September 28, 1850, c. 84, 9 Stat. 519:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.

SEC. 2. *And be it further enacted,* That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however,* That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

SEC. 3. *And be it further enacted,* That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation," shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

SEC. 4. *And be it further enacted,* That the provisions of this act be extended to, and their bene-

fits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known as designated as aforesaid, may be situated.

Approved, September 28, 1850.

Act of March 3, 1851, c. 41, 9 Stat. 631:

Chap. XLI. An Act to ascertain and settle the private Land Claims in the State of California.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of ascertaining and settling private land claims in the State of California, a commission shall be, and is hereby, constituted, which shall consist of three commissioners, to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States.

SEC. 2. *And be it further enacted,* That a secretary, skilled in the Spanish and English languages, shall be appointed by the said commissioners, whose duty it shall be to act as interpreter, and to keep a record of the proceedings of the board in a bound book, to be filed in the office of the Secretary of the Interior on the termination of the commission.

SEC. 3. *And be it further enacted,* That such clerks, not to exceed five in number, as may be necessary, shall be appointed by the said commissioners.

SEC. 4. *And be it further enacted,* That it shall be lawful for the President of the United States to appoint an agent learned in the law, and skilled in the Spanish and English languages, whose spe-

cial duty it shall be to superintend the interests of the United States in the premises, to continue him in such agency as long as the public interest may, in the judgment of the President, require his continuance, and to allow him such compensation as the President shall deem reasonable. It shall be the duty of the said agent to attend the meetings of the board, to collect testimony in behalf of the United States, and to attend on all occasions when the claimant, in any case before the board, shall take depositions; and no deposition taken by or in behalf of any such claimant shall be read in evidence in any case, whether before the commissioners, or before the District or Supreme Court of the United States, unless notice of the time and place of taking the same shall have been given in writing to said agent, or to the district attorney of the proper district, so long before the time of taking the deposition as to enable him to be present at the time and place of taking the same, and like notice shall be given of the time and place of taking any deposition on the part of the United States.

SEC. 5. *And be it further enacted,* That the said commissioners shall hold their sessions at such times and places as the President of the United States shall direct, of which they shall give due and public notice; and the marshal of the district in which the board is sitting shall appoint a deputy, whose duty it shall be to attend upon the said board, and who shall receive the same compensation as is allowed to the marshal for his attendance upon the District Court.

SEC. 6. *And be it further enacted,* That the said commissioners, when sitting as a board, and each commissioner at his chambers, shall be, and are, and is hereby, authorized to administer oaths, and

to examine witnesses in any case pending before the commissioners, that all such testimony shall be taken in writing, and shall be recorded and preserved in bound books to be provided for that purpose.

SEC. 7. *And be it further enacted,* That the secretary of the board shall be, and he is hereby, authorized and required, on the application of the law agent or district attorney of the United States, or of any claimant or his counsel, to issue writs of subpoena commanding the attendance of a witness or witnesses before the said board or any commissioner.

SEC. 8. *And be it further enacted,* That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered.

SEC. 9. *And be it further enacted,* That in all cases of the rejection or confirmation of any claim by the board of commissioners, it shall and may be lawful for the claimant or the district attorney, in behalf of the United States, to present a petition to the District Court of the district in which

the land claimed is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim; and such petition, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present claimants, and shall contain a deraignment of the claimant's title, together with a transcript of the report of the board of commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, a copy of which petition, if the same shall be presented by a claimant, shall be served on the district attorney of the United States, and, if presented in behalf of the United States, shall be served on the claimant or his attorney; and the party upon whom such service shall be made shall be bound to answer the same within a time to be prescribed by the judge of the District Court; and the answer of the claimant to such petition shall set forth fully the nature of the claim, and the names of the original and present claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, copies of which answers shall be served upon the adverse party thirty days before the meeting of the court, and thereupon, at the first term of the court thereafter, the said case shall stand for trial, unless, on cause shown, the same shall be continued by the court.

SEC. 10. *And be it further enacted,* That the District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court, and shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States, on such security for costs in the District and Supreme Court, in case the judgment of the District Court shall be affirmed, as the said court shall prescribe; and if the court shall be satisfied that the party desiring to appeal is unable to give such security, the appeal may be allowed without security.

SEC. 11. *And be it further enacted,* That the commissioners herein provided for, and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

SEC. 12. *And be it further enacted,* That to entitle either party to a review of the proceedings and decision of the commissioners hereinbefore provided for, notice of the intention of such party to file a petition to the District Court shall be entered on the journal or record of proceedings of the commissioners within sixty days after their decision on the claim has been made and notified to the parties, and such petition shall be filed in the District Court within six months after such decision has been rendered.

SEC. 13. *And be it further enacted,* That all lands the claims to which have been finally re-

jected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims the said surveyor-general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act "to create the office of surveyor of the public lands for the State of Louisiana," approved third March, one thousand eight hundred and thirty-one: *Provided always,* That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same. *And provided, further,* That it shall and may be lawful for the district judge of the United States,

upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the commissioner of the general land office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

SEC. 14. *And be it further enacted,* That the provisions of this act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town or village existed on the seventh day of July, eighteen hundred and forty-six; but the claim for the same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town, or village was originally granted to an individual, the claim shall be presented by or in the name of such individual, and the fact of the existence of the said city, town, or village on the said seventh July, eighteen hundred and forty-six, being duly proved, shall be prima facie evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town, or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town or village.

SEC. 15. *And be it further enacted,* That the final decree rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

SEC. 16. *And be it further enacted,* That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.

SEC. 17. *And be it further enacted,* That each commissioner appointed under this act shall be allowed and paid at the rate of six thousand dollars per annum; that the secretary of the commissioners shall be allowed and paid at the rate of four thousand dollars per annum; and the clerks herein provided for shall be allowed and paid at the rate of one thousand five hundred dollars per annum; the aforesaid salaries to commence from the day of the notification by the commissioners of the first meeting of the board.

SEC. 18. *And be it further enacted,* That the secretary of the board shall receive no fee except for furnishing certified copies of any paper or record, and for issuing writs of subpoena. For furnishing certified copies of any paper or record, he shall receive twenty cents for every hundred words, and for issuing writs of subpoena, fifty cents for each witness; which fees shall be equally divided between the said secretary and the assistant clerk.

Approved, March 3, 1851.

California Statutes, 1854-1855, pp. 48-49, Chapter XLIII (Passed May 11, 1854):

AN ACT declaring the Consent of the Legislature of the State of California to the Purchase by the United States of Signor, or Mare Island; to relinquish the Title and Interest of the State in overflowed portions of said Island, and to vest the Jurisdiction over the same in the United States, for the purposes therein specified. [Passed May 11, 1854.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. The consent of the State of California is hereby given to the purchase by the United States of a certain tract or parcel of land situated in the county of Solano, known as Signor or Mare Island, for the purpose of erecting and maintaining thereon such arsenals, magazines, docks, dock-yards, and other military and naval structures as may be required for the use of the Government of the United States.

SECTION 2. The title and interest of the State of California to, and in such portions of the Island described in the preceding section as are overflowed beach, or swamp lands, on the eastern shore of the said Island, from the southern point thereof to a parallel intersecting the northern point of the highlands, and extending into the waters of the bay or straits, washing the eastern shore of said highlands of the Island to ship channel, is hereby relinquished and granted to the United States for the purposes specified in the preceding section; and the jurisdiction of such part of said Island, and the overflowed portions of the eastern shore thereof as are south of a parallel intersecting the

northern point of the highlands, is hereby ceded by the State of California to the United States for the purposes aforesaid: *Provided,* That the consent to the purchase, and the grant and relinquishment of title, by this State to the United States, in this Act contained, shall not be construed in aid or support, directly or impliedly, of any conveyance or bond for title to the United States of the same lands heretofore made, or which may hereafter be made, by any person or persons, company or corporations, or as a recognition on the part of the State of California of any claim, title or grant heretofore asserted or set up, or which may hereafter be asserted or set up by any person or persons, company or corporation.

SECTION 3. The jurisdiction ceded to the United States in the last preceding section is upon the express condition that the State of California shall retain a concurrent jurisdiction with the United States in and over said tract of land, so far as that civil process in all cases, and such criminal process as may issue under the authority of the State of California, against any person or persons charged with crime committed within or without said tracts of land, may be executed therein in the same way and manner as if this jurisdiction had not been ceded, except so far as such process may affect any of the real or personal property of the United States within the said tract of land; and all the lands and tenements within the limits aforesaid shall be, and continue forever hereafter, exonerated and discharged from all taxes, assessments, and other charges which may be imposed by authority of this State.

SECTION 4. The relinquishment made, the jurisdiction ceded, and the exemption from taxation granted by this Act, shall continue so long as the

premises herein specified shall remain in the occupancy of the above United States of America, for the purposes mentioned in the first section of this Act, and no longer.

California Code of Civil Procedure:

SEC. 322. *Occupation under written instrument or judgment, when deemed adverse.* When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely except that when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

SEC. 323. *What constitutes adverse possession under written instrument or judgment.* For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved;

2. Where it has been protected by a substantial inclosure;

3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing-timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant;

4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

SEC. 324. *Premises actually occupied under claim of title deemed to be held adversely.* Where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied, and no other, is deemed to have been held adversely.

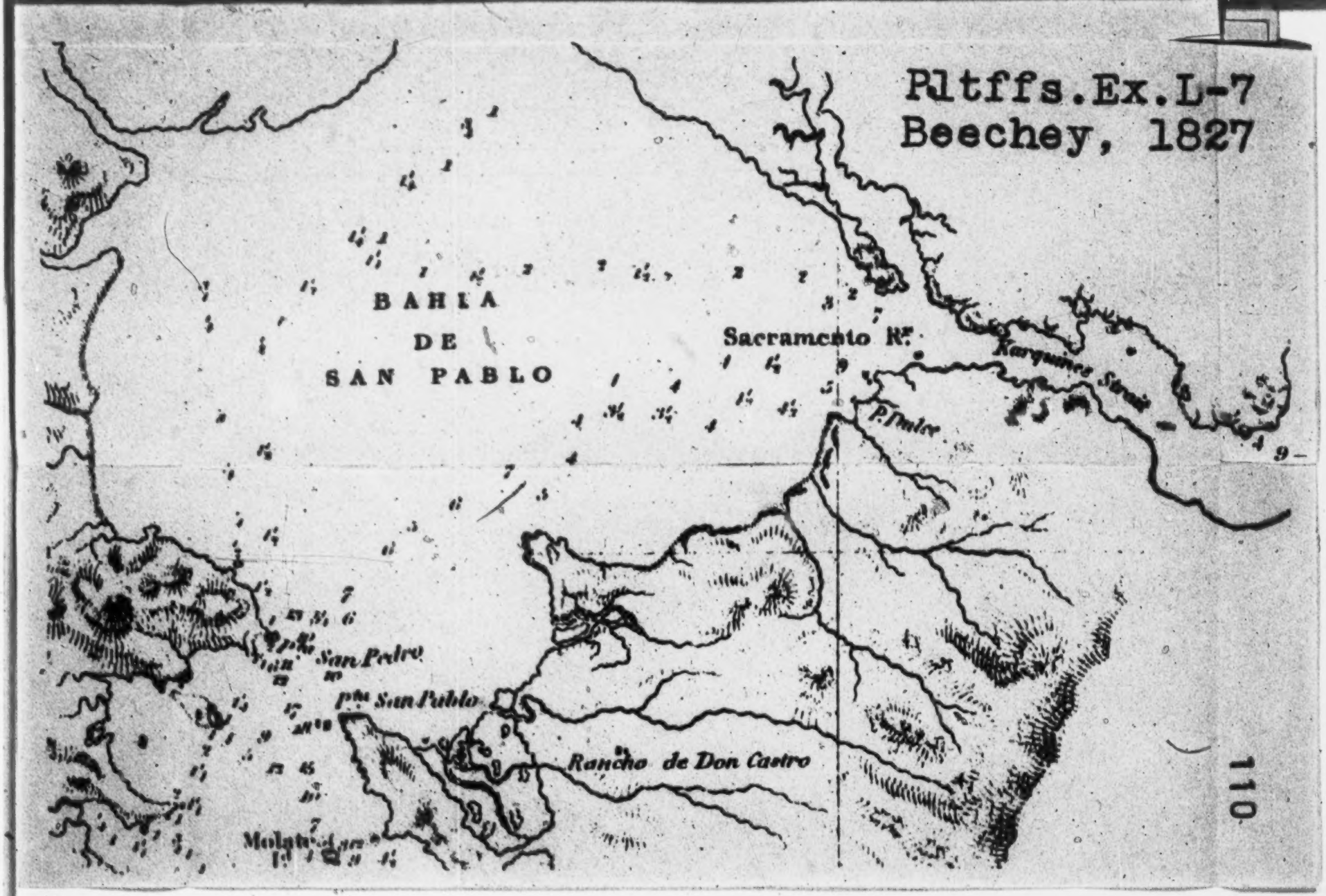
SEC. 325. *What constitutes adverse possession under claim of title not written.* For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure.

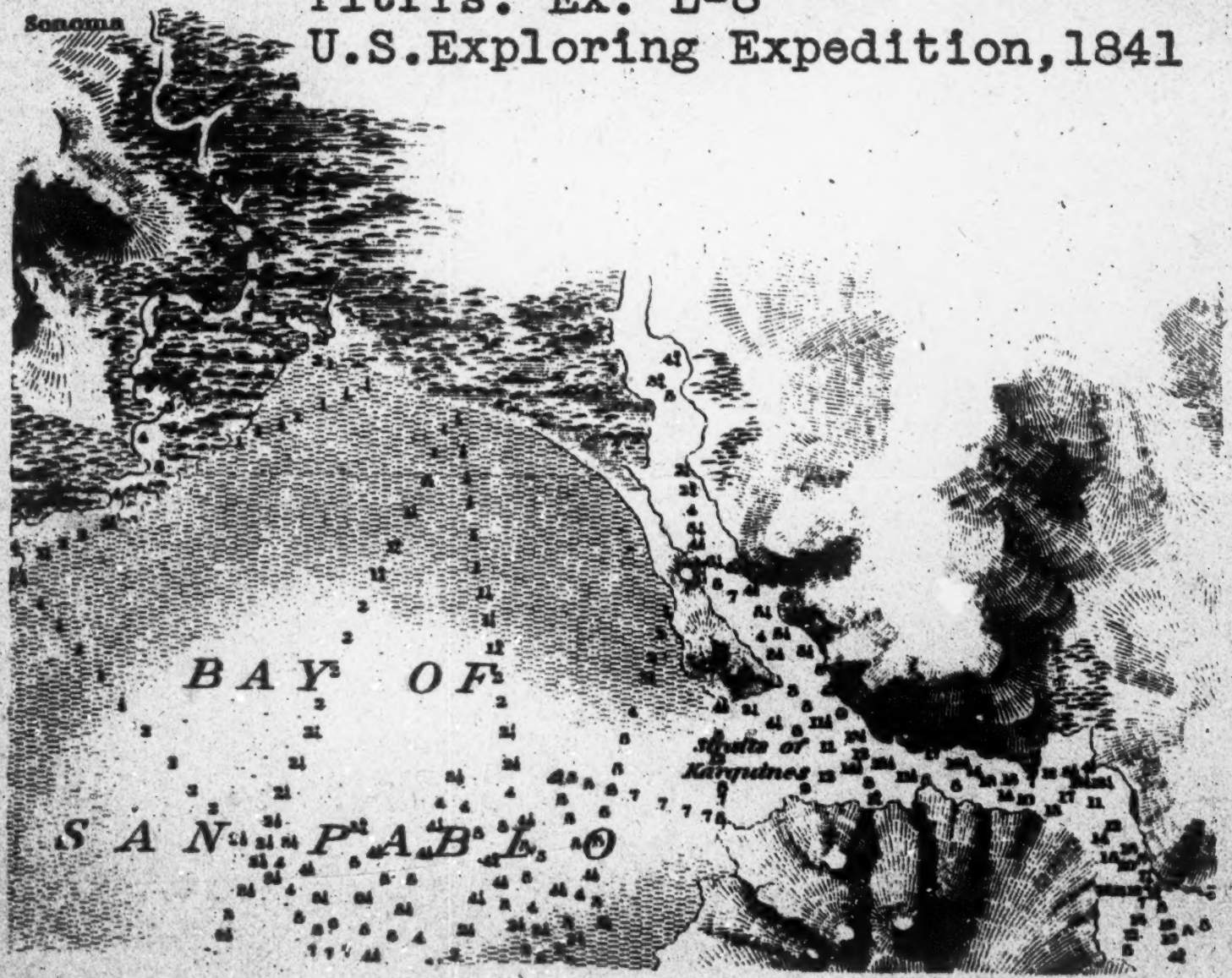
2. Where it has been usually cultivated or improved.

Provided, however, that in no case shall adverse possession be considered established under the provisions of any section or sections of this code, un-

less it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal which have been levied and assessed upon such land.


Pltffs.Ex.L-7
Beechey, 1827
BAHIA
DE
SAN PABLO
Sacramento R.
Karquines Strait
P. Pinole
San Pedro
Pta San Pablo
Rancho de Don Castro
110

Pltffs. Ex. L-8
U.S.Exploring Expedition,1841



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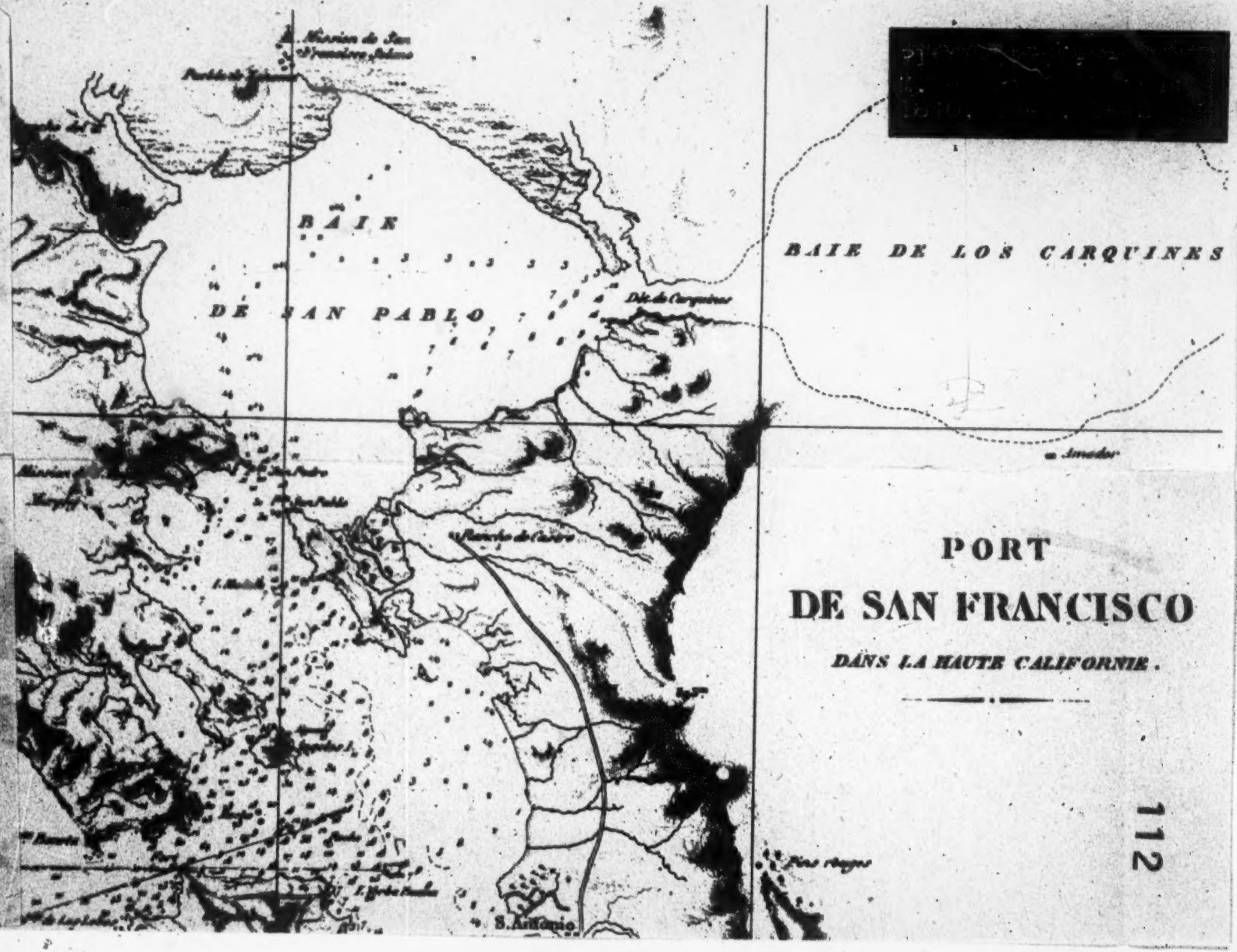


PORT
DE SAN FRANCISCO

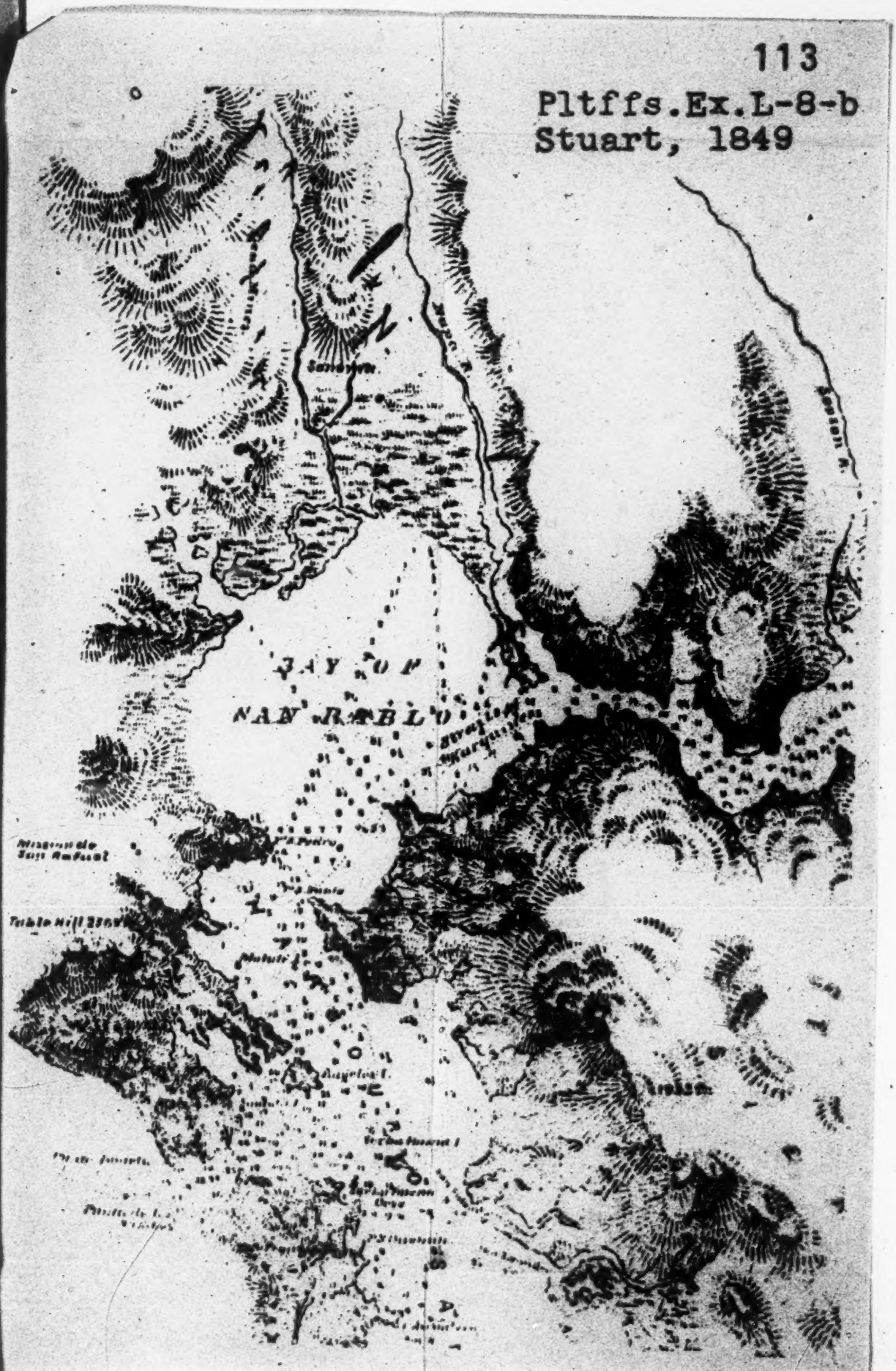
DANS LA HAUTE CALIFORNIE.

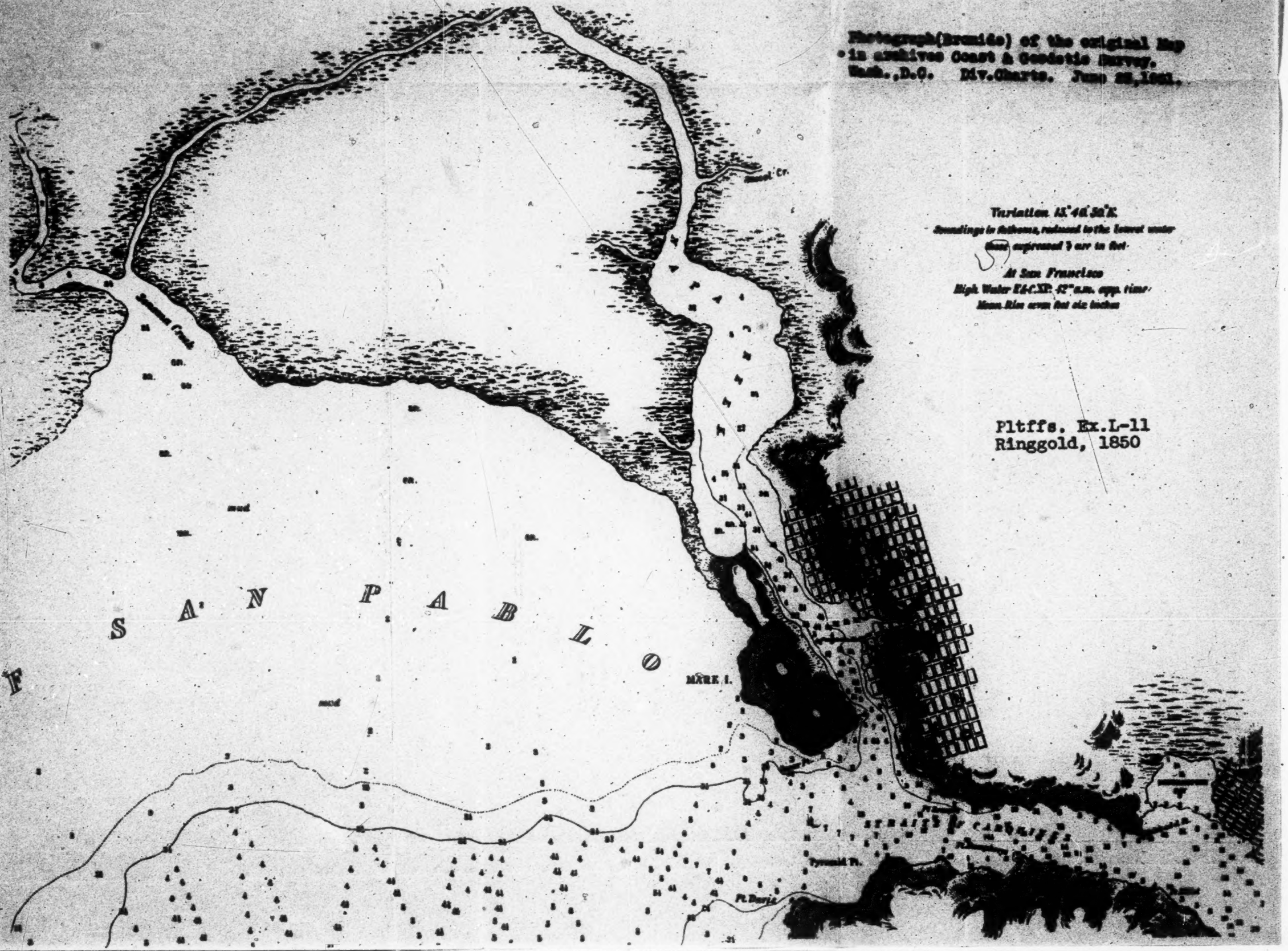
112

113

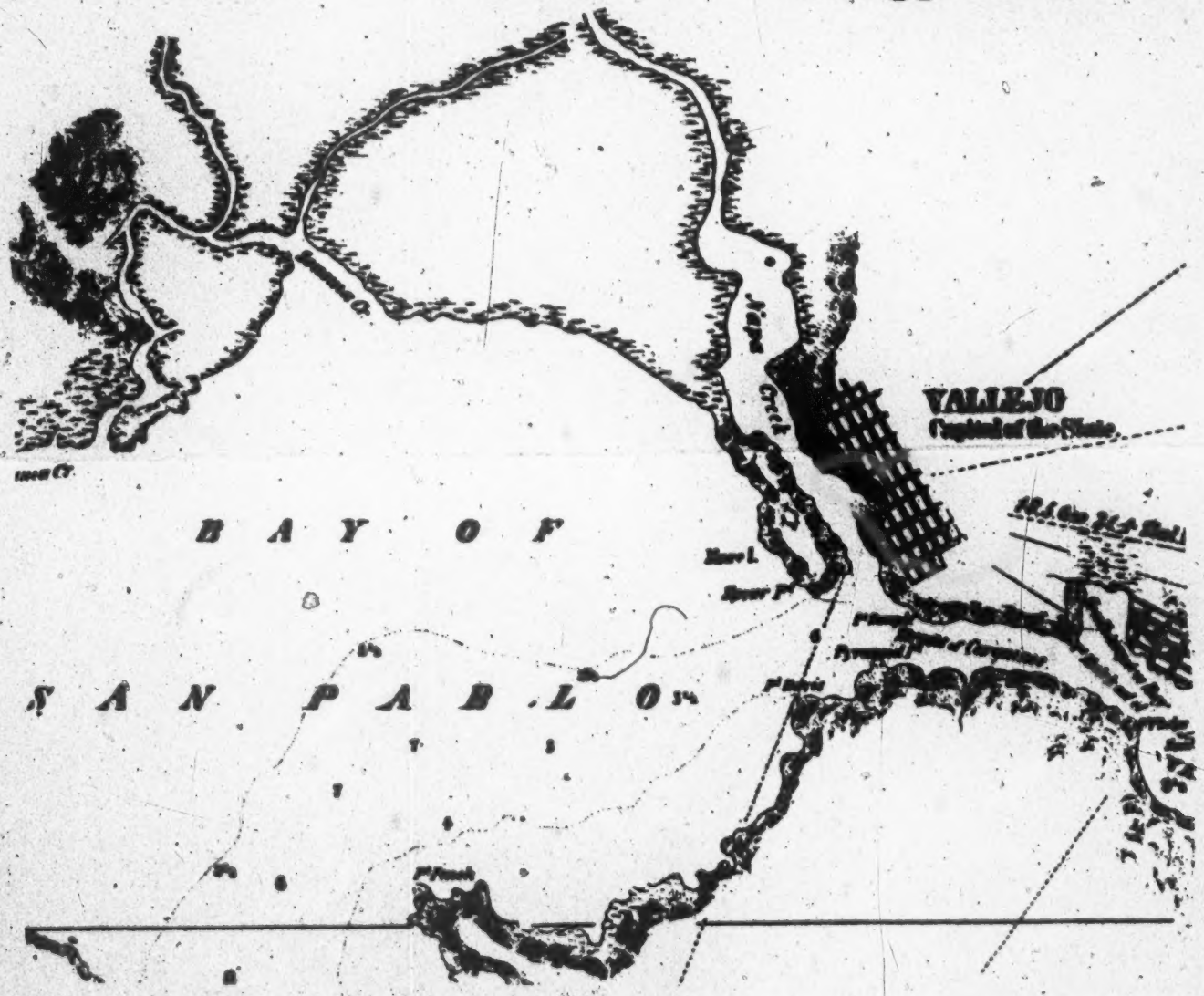
Pltffs.Ex.L-8-b

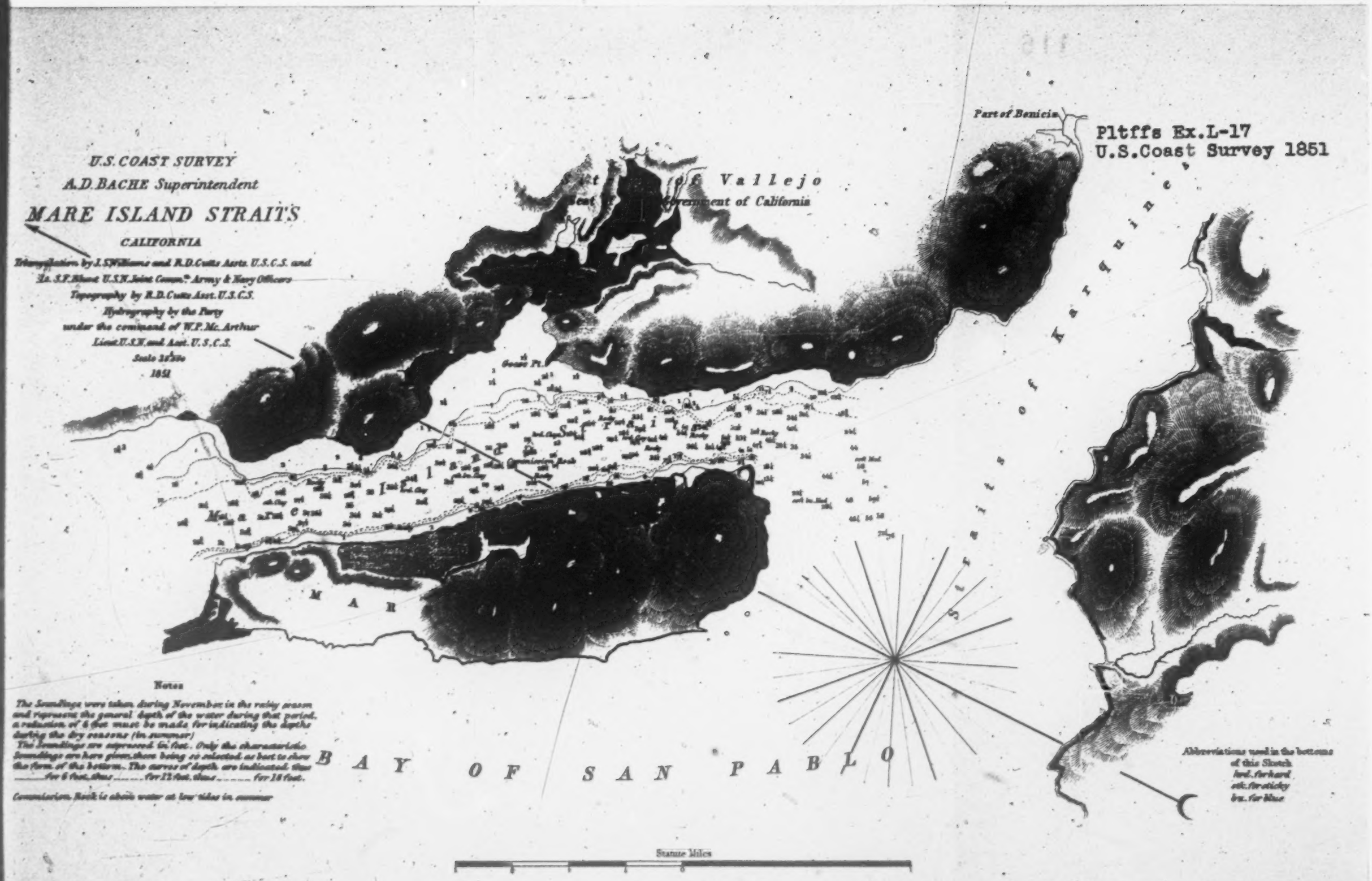
Stuart, 1849

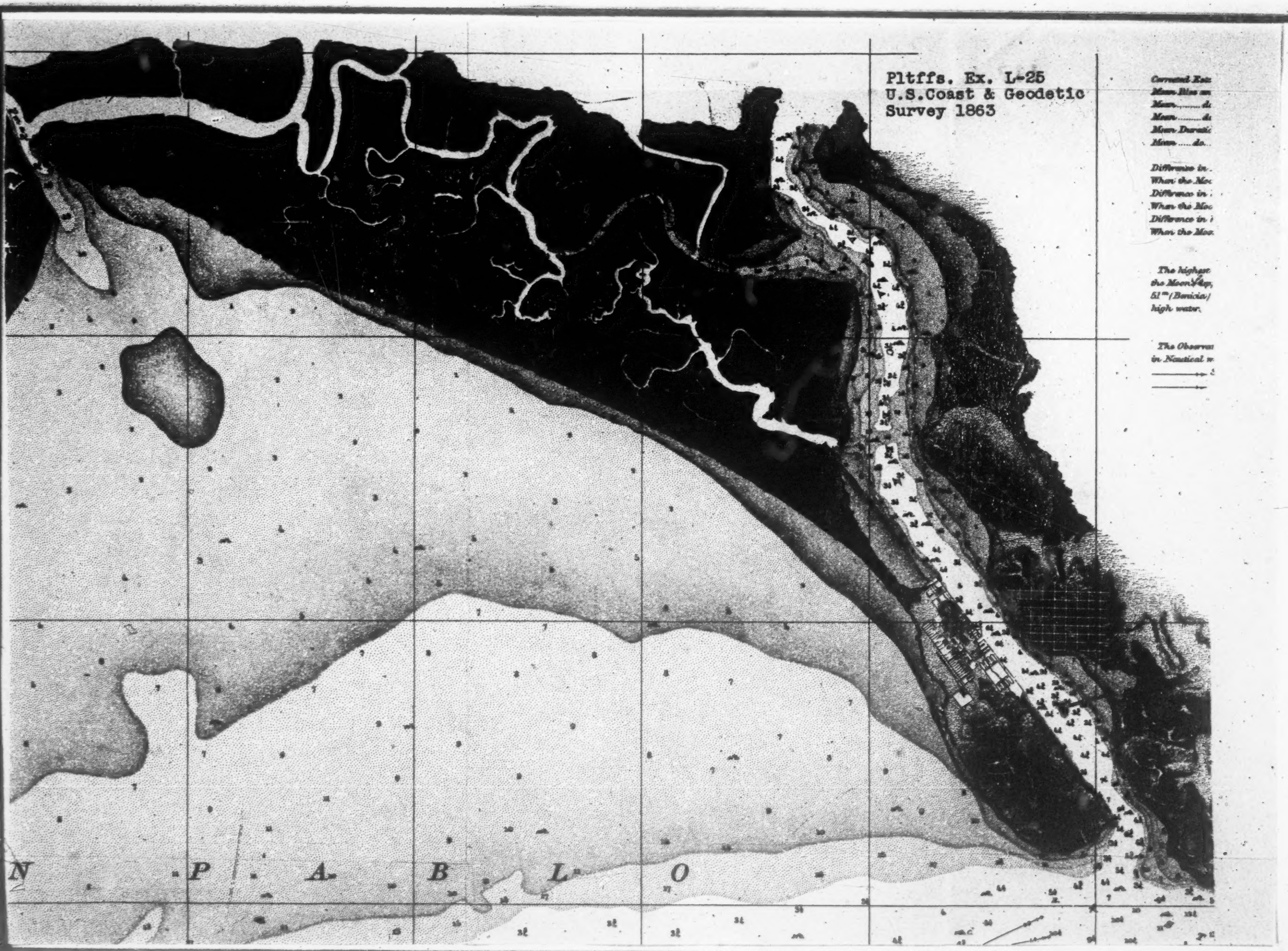



Photograph(Bromide) of the original Map
in archives Coast & Geodetic Survey.
Wash.,D.C. Div.Charts. June 28,1901.
Variation 15°40'30"E.
Soundings in fathoms, reduced to the lowest water
those expressed ½ are in feet
At San Francisco
High Water E&C.XP. 12" a.m. app. time
Mean Rise seven feet six inches
Pltffs. Ex.L-11
Ringgold, 1850
SAN PABLO
MARE I.
Pyramid Pt.
Pt. Davis

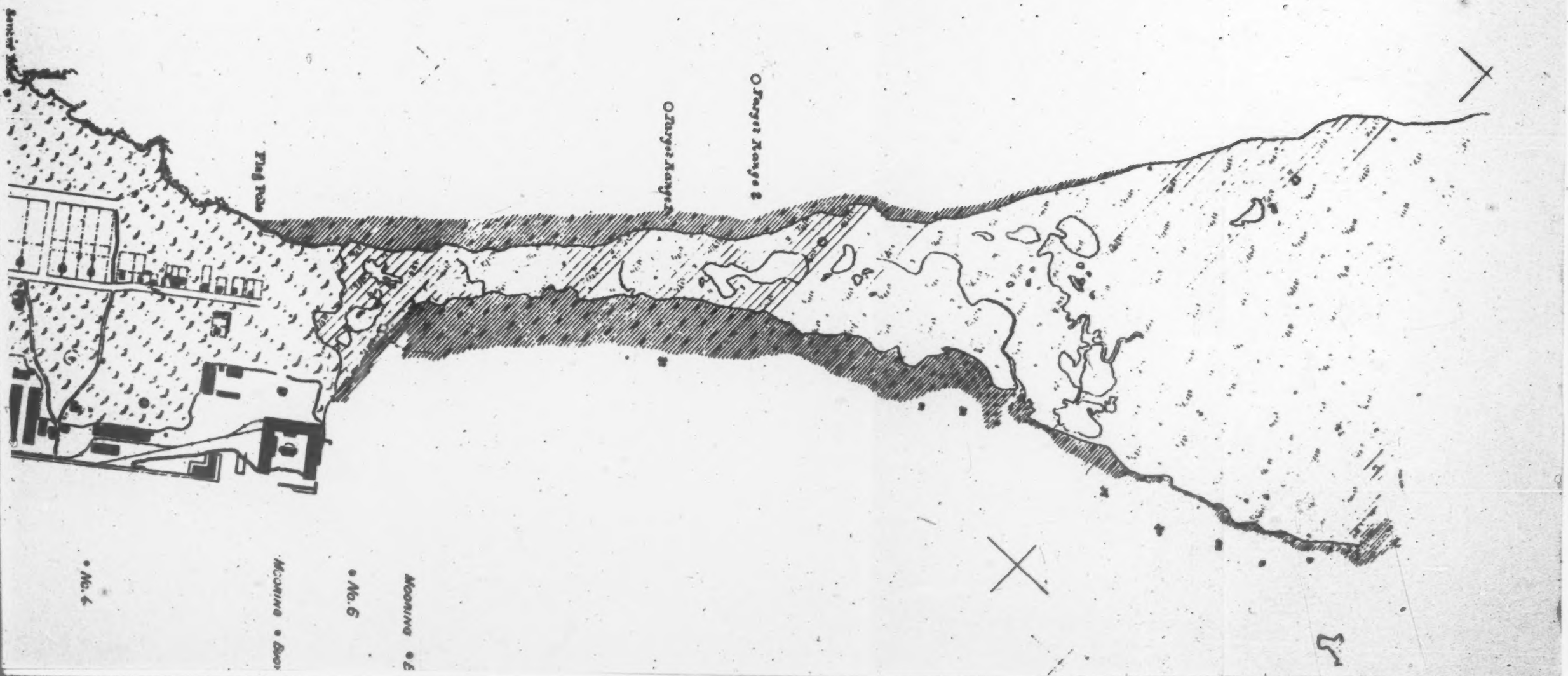
Pltffs.Ex.L-13
Ringgold, 1850



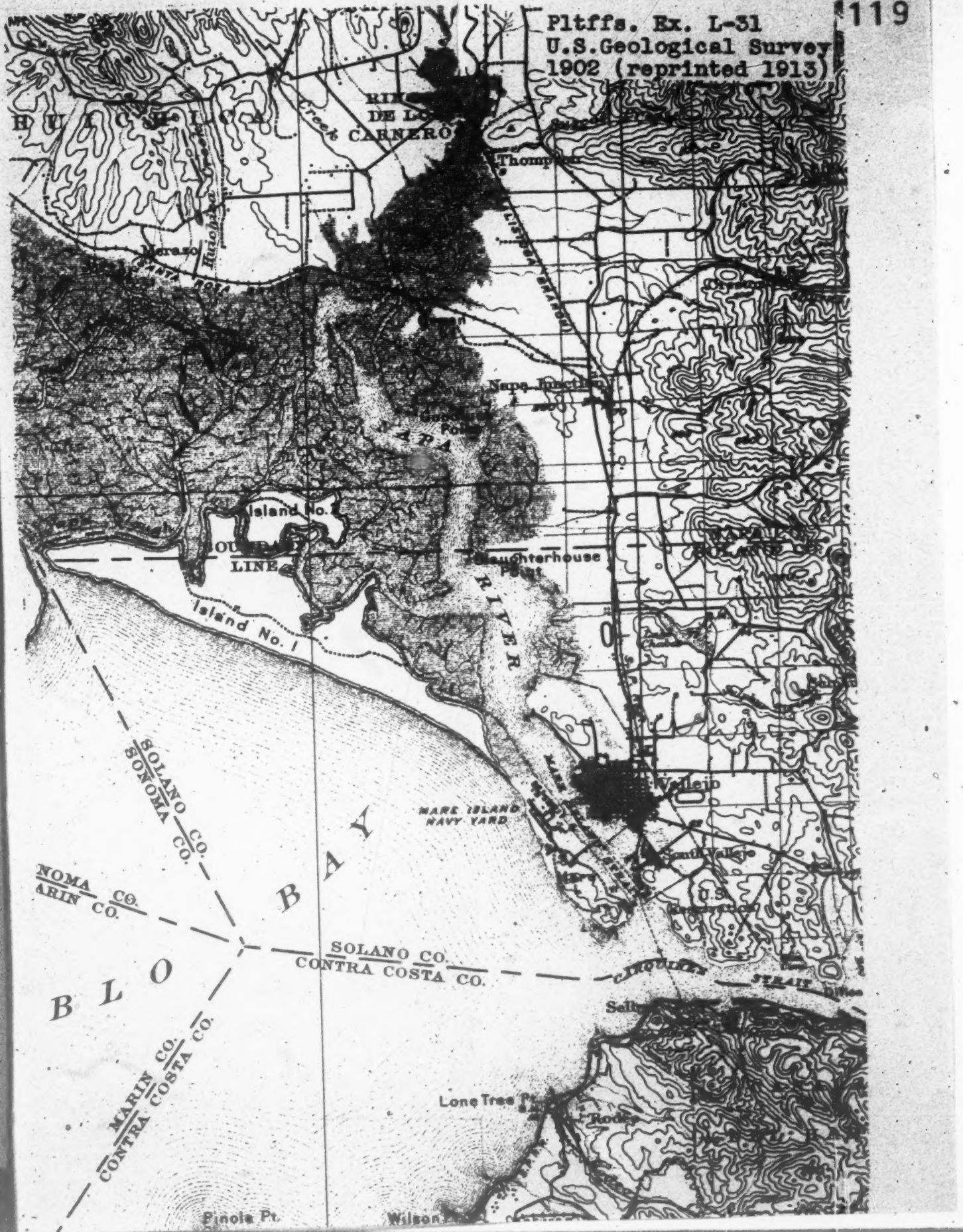

Pltffs Ex.L-17
U.S.Coast Survey 1851
U.S. COAST SURVEY
A.D. BACHE Superintendent
MARE ISLAND STRAITS
CALIFORNIA
Triangulation by J.S.Williams and R.D.Cutts Assts. U.S.C.S. and
Lt. S.F.Blunt U.S.N. Joint Comm.ⁿ Army & Navy Officers
Topography by R.D.Cutts Asst. U.S.C.S.
Hydrography by the Party
under the command of W.P.Mc.Arthur
Lieut.U.S.N. and Asst. U.S.C.S.
1851
Part of Benicia
Vallejo
Government of California
Goose Pt.
Straits of Karquines
BAY OF SAN PABLO
Notes
The Soundings were taken during November in the rainy season and represent the general depth of the water during that period, a reduction of 6 feet must be made for indicating the depths during the dry seasons (in summer)
The Soundings are expressed in feet. Only the characteristic Soundings are here given, these being so selected as best to show the form of the bottom. The curves of depth are indicated thus ——— for 6 feet, thus ..... for 12 feet, thus ..... for 18 feet.
Commission Rock is above water at low tides in summer
Abbreviations used in the bottoms of this Sketch
hrd. for hard
stk. for sticky
bu. for blue
Statute Miles

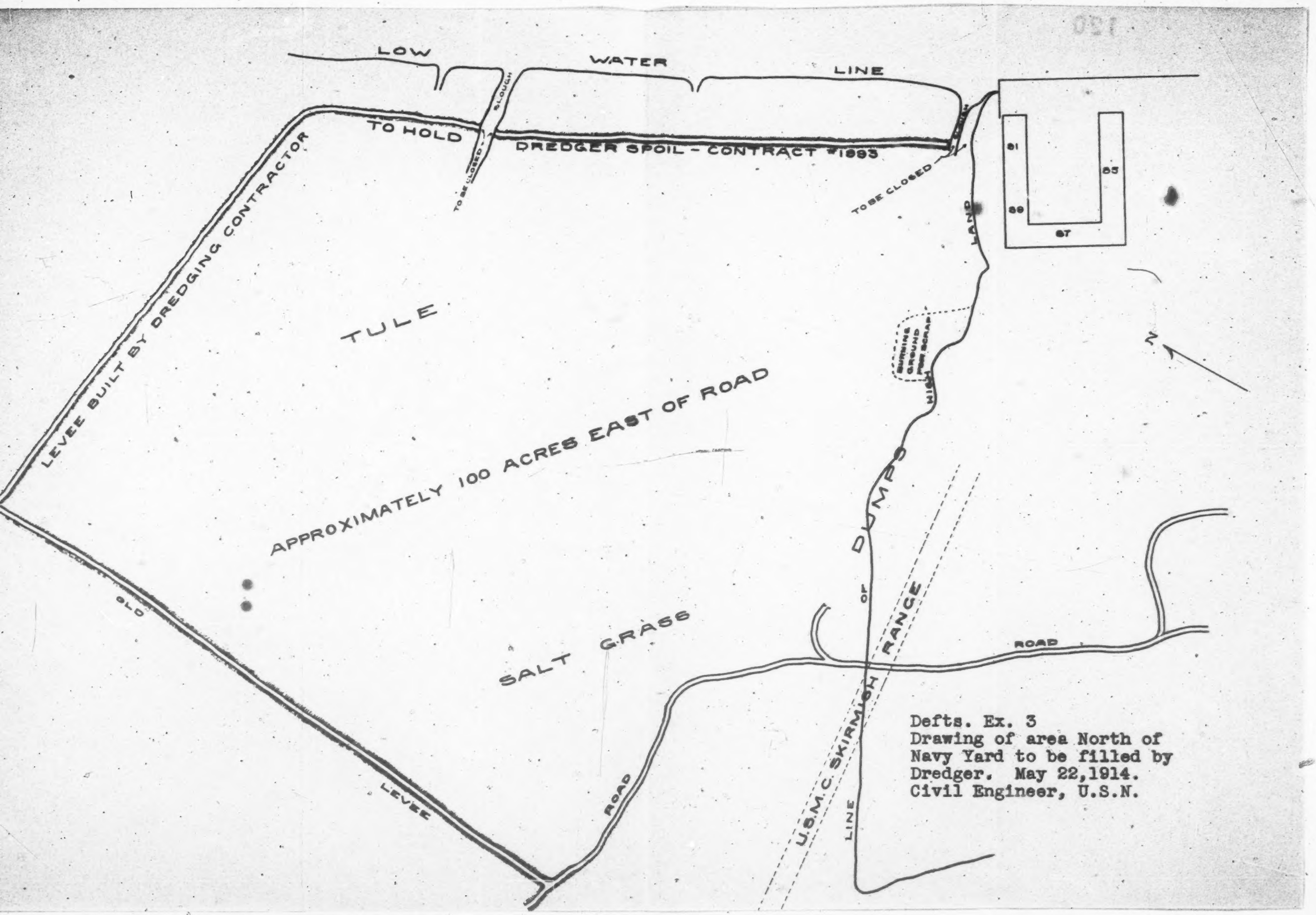

Pltffs. Ex. L-25
U.S.Coast & Geodetic
Survey 1863
N P A B L O

Pltffs. Ex. L-27
U.S.Coast & Geodetic Survey
Resurvey of San Pablo Bay 1886



Pltffs. Ex. L-31
U.S.Geological Survey
1902 (reprinted 1913)





Defts. Ex. 3
Drawing of area North of
Navy Yard to be filled by
Dredger. May 22,1914.
Civil Engineer, U.S.N.

A-11000
A-10000
A-9000
A-8000
A-7000
A-6000
A-5000

RADIO
(5-450' TOWERS)

DUMP

DUMP

MARINE CORPS
RIFLE RANGE

AVIATION
LANDING FIELD

TIDAL SLOUGH

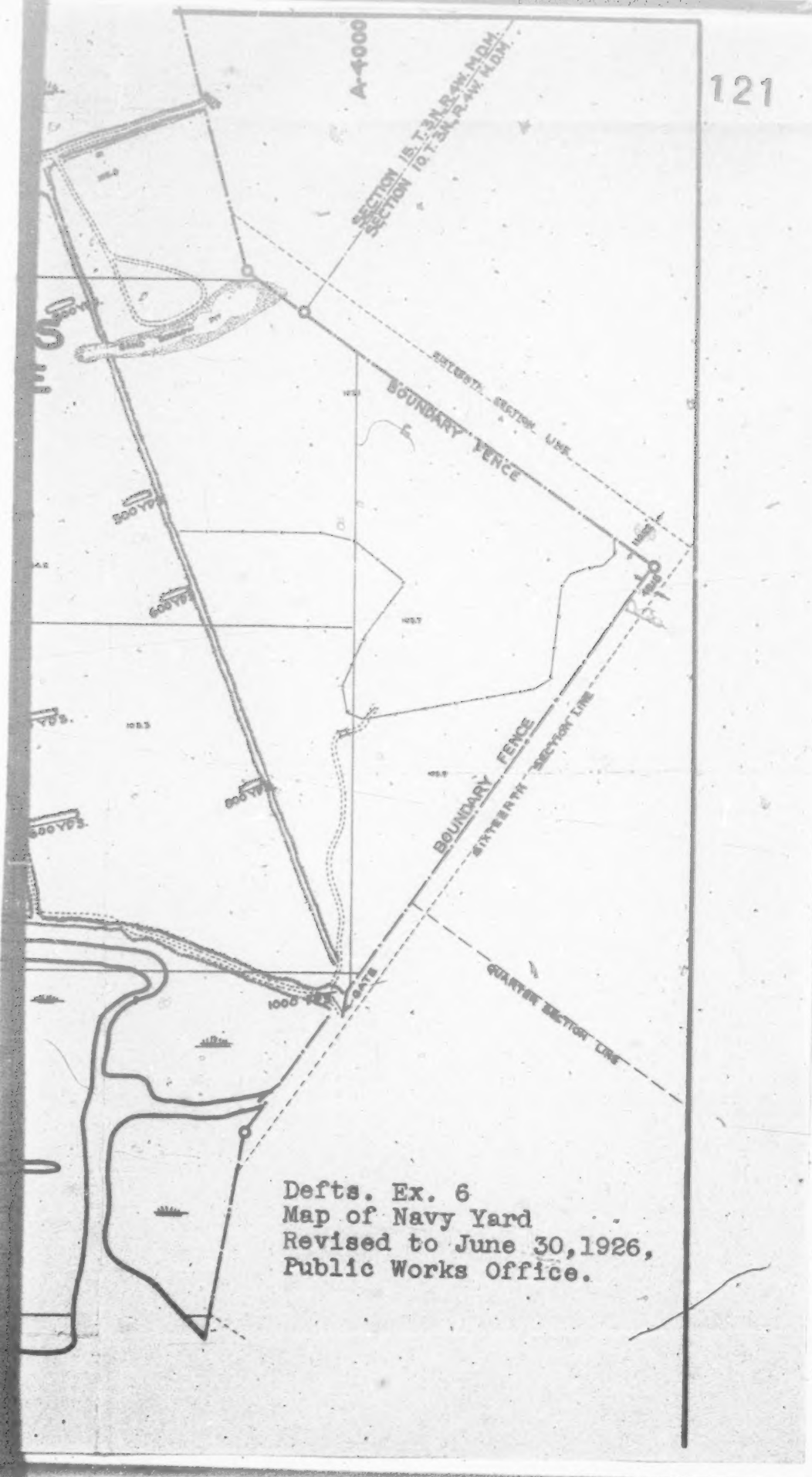
SUBMARINE
REPAIR
BASE

FREIGHT
WHARF

Dredge to 30'
Dredge to 35'
Dredge to 37'
Dredge to 20'

·LEGEND·

Ship's Berth
R.R. Track
Crane Track
Tidal Marsh
Fire Alarm
Dolphin



Defts. Ex. 6
Map of Navy Yard
Revised to June 30,1926,
Public Works Office.

SUPREME COURT OF THE UNITED STATES.

No. 487.—October Term, 1937.

United States of America, *vs.* James E. O'Donnell, et al. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 28, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

This case involves the validity of the title of the United States to a part of Mare Island in San Francisco Bay, which was reserved for public purposes by Presidential Proclamation in 1850, was selected by the Secretary as a navy yard pursuant to Act of Congress, was reserved for that purpose by Presidential Order in 1853, and since 1854 has been so used.

The lands in question are in the area acquired as a result of the Mexican War by the Treaty of Guadalupe Hidalgo, July 4, 1848, 9 Stat. 922, which guaranteed the property rights of Mexicans in the annexed territory. The United States claims under deed to it in 1853 by Bissell and Aspinwall and another, who derived their title under grant of May 20, 1841, by Alvarado, Mexican Governor of California, to Castro, a Mexican citizen, of the island La Yegu (Mare Island) "in all its extent". Respondents claim under a patent issued by California to Darlington in 1857, purporting to convey the land in question as a part of the swamp or overflowed lands granted to the state by the Swamp Lands Act of Congress, Sept. 28, 1850, c. 84, 9 Stat. 519.

Upon the military occupation of California during the Mexican War the United States military commander had proclaimed officially that Mexican land titles would receive due recognition by the United States,[1] and Art. 8 of the Treaty of 1848 with Mexico declared that the property rights of Mexicans in the annexed territory should be "inviolably respected." After the admission of California to statehood, September 9, 1850, Congress adopted the Mexican Claims Act of March 3, 1851, 9 Stat. 631, which established a Board of Land Commissioners with authority, upon petition of

[1] Proclamation to the Inhabitants of California, July 7, 1846, at Monterey, by Commodore John D. Sloat, 29th Cong., 2d Sess., House Doc. No. 4, pp. 644-645; Proclamation, August 17, 1846, at Ciudad de Los Angeles, by Commodore and Governor R. F. Stockton, *id.*, pp. 669-670.

those claiming under Mexican or Spanish grants of land in the annexed territory, to pass upon the validity of the grants. Right to a review of the Board's determination by the district court, and the Supreme Court of the United States, was allowed the claimants and the Government. By § 12 of the Act of August 31, 1852, 10 Stat. 76, 99, the Attorney General was given authority over appeals from decisions of the Board adverse to the interests of the United States.

Bissell and Aspinwall, the grantors of the United States, filed their petition before the Board, seeking confirmation of their title under the Castro grant of May 20, 1841. After hearing evidence the Board confirmed their title by decree of May 8, 1855. Upon appeal by the United States to the district court for northern California, the decree of the Board was affirmed. Appeal by the Government to the Supreme Court of the United States, allowed by the district court April 1, 1857, was dismissed by the Government in the same year. The decree of the district court was not signed or entered until a decree *nunc pro tunc* as of March 2, 1857, was signed, filed and entered on April 15, 1930.

While the proceedings were still pending before the Board, the claimants, Bissell and Aspinwall, on December 15, 1852, executed a contract to sell Mare Island to the United States, and on January 4, 1853, for a consideration of $83,491, they joined in a deed to the United States, without covenants except for further assurance. The deed purported to convey Mare Island, "including all the Tule or low land and marsh belonging to the same or which has ever been reputed or claimed to belong to the same . . ." On February 28, 1853, they executed a bond in favor of the United States in the sum of $200,000, conditioned upon the validity of their contract and the conveyance of "the entire and absolute fee simple Estate in the said tract of land known as Mare Island." The bond recited that they "shall at all times hereafter indemnify and save harmless the United States against any claim or title to the said tract called Mare Island and its appurtenances which may be set up by or through any person or persons claiming under Victor Castro and his assigns" and that they should "also indemnify and save harmless the United States against any adverse claim or title in any other person or persons or body politic which may within two years from the date hereof, be made and thereafter be successfully established".

The 1857 California patent to Darlington was not recorded until June 6, 1879, when one Sawyer appears to have acquired the Dar-

lington claim. See *Sawyer* v. *Osterhaus*, 212 Fed. 763, 767. The Secretary of the Interior having found that the lands in question were swamp lands within the Swamp Lands Act of 1850, the respondents in 1928 by mandamus compelled the Secretary to certify the lands for patent to the State of California. The court, in awarding the relief sought, at the same time declared with reference to the contentions made here, "the mere issuance of patent to California determines no legal or equitable right of the United States in the premises." *Work* v. *United States ex rel. O'Donnell*, 23 F. (2d) 136, 138.

The present suit was brought by the United States in the district court for northern California to quiet its title. Respondents, by their answer, put in issue the Government's ownership of the lands in question and asserted their title as tenants in common under the Darlington grant. They specifically challenged the existence and validity of the Castro grant, the validity of the decrees of confirmation of the title of Bissell and Aspinwall, and any prescriptive title of the United States. They prayed, as affirmative relief, that their title be quieted, and in support of their prayer alleged that the lands in question were not embraced in the Castro grant and also were swamp lands which had passed to California under the Swamp Lands Act.

The trial court made findings of fact and reached conclusions of law in favor of the United States on all these issues. Upon appeal, the Court of Appeals for the Ninth Circuit reversed and decreed "that the United States has no title to the patented lands in suit, and that the title is in and quieted in" respondents. 91 F. (2d) 14. The Court of Appeals found that Alvarado, the Mexican Governor of California, had executed the purported grant of Mare Island to Castro, including the land in question, but made no finding with respect to the adverse possession of the United States found by the district court. It held that the paper signed by Alvarado was incompetent evidence of the grant to Castro because of the lack of filing or recordation of the grant in the Mexican archives, see *Berreyesa* v. *United States*, 154 U. S. 623, and that the decrees of the Board of Land Commissioners and of the district court on appeal from the Board, confirming the Castro title, were null and void and worthless as evidence because the United States had purchased the interest of the claimants Bissell and Aspinwall while the proceedings were pending before the Board. It characterized the proceeding as collusive and the action of the United

States in acquiring title during its pendency as breach of a trust duty assumed under the Swamp Lands Act to convey swamp lands to California, and as in effect a fraud upon the state. It rejected the contention of the United States that the pending Board proceeding for confirmation of the Castro grant withdrew the land in question from the operation of the Swamp Lands Act, which is the source of California's and respondents' alleged title to the land, and held that the reservations of the land made by Presidential proclamations for military and naval purposes were ineffective, because California had previously acquired an inchoate title under the Swamp Lands Act.

Respondents renew here the contention made below, based on an elaborate review of the evidence, that the swamp or overflowed lands in question were below high tide and were not within the exterior boundaries of Mare Island as it was known at the time of the Castro grant, and so were not intended by the grantor to be, and were not in fact, included in the description of the grant. Resolution of this issue turns upon appraisal of the evidence and the inferences to be drawn from it. As both courts below have found against respondents on this issue we shall not reexamine the evidence here. We accept the concurrent findings as establishing the fact that the lands in question were within the description of the deed to Castro. *United States* v. *State Investment Co.*, 264 U. S. 206, 211; *Shappirio* v. *Goldberg*, 192 U. S. 232; cf. *Page* v. *Rogers*, 211 U. S. 575; *Washington Securities Co.* v. *United States*, 234 U. S. 76; *National Bank* v. *Shackleford*, 239 U. S. 81; *Risty* v. *Chicago, R. I. & P. R. Co.*, 270 U. S. 378.

Nor is the fact that a patent has issued to California, in obedience to the judgment in the mandamus proceeding brought by respondents in *Work* v. *United States ex rel. O'Donnell, supra*, decisive of any issue presented here. Upon the Secretary's approval of the survey of the land in question by the United States Surveyor General for the State of California, showing the lands to be swamp and overflowed at the date of the Swamp Lands Act, and the determination by the Secretary that the lands in question were then swamp and overflowed, it became his duty under the Swamp Lands Act, and under the Act of Congress of July 23, 1866, 14 Stat. 218, to certify the lands for patent to the State. See *Tubbs* v. *Wilhoit*, 138 U. S. 134. But the adjudication in mandamus that it was the duty of the Secretary to issue the patent under these

acts, and the issuance of it, determined no legal or equitable right of the United States in the premises. It remains open to the United States in this or any other appropriate proceeding, to show that the lands did not pass under the Swamp Lands Act. *United States* v. *Schurz*, 102 U. S. 378, 404; *Emelting Co.* v. *Kemp*, 104 U. S. 636, 641, 646; *United States* v. *Conway*, 175 U. S. 60, 68, and cases cited; see *Work* v. *United States ex rel. O'Donnell, supra*, 137, 138.

We accordingly direct our attention to the question, deemed pivotal below, whether, as the Court of Appeals held, the confirmation of the title of Bissell and Aspinwall under the Castro grant by the Board of Land Commissioners was invalid, so that the United States neither reserved nor acquired a title valid as against the State of California and respondents who claim under her. In answering, it will be an aid to adequate understanding of the points in issue to consider first the effect of the confirmation by the Board, without reference to the alleged collusion and fraudulent action of the United States or any of its officers.

The Swamp Lands Act of 1850 was effective to transfer an interest in the lands described in the Act, only so far as they were part of the public domain of the United States and thus subject to the disposal of Congress. The Act in terms purported to grant to the several states all swamp and overflowed lands located within their respective boundaries "which shall remain unsold at the passage of this Act." Section 2 made it the duty of the Secretary of Interior "to make out an accurate list and plats" of the lands described by the Act and to "cause a patent to be issued to the state therefor". The effect of these provisions was to invest the state *in praesenti* with an inchoate title to those lands falling within the description of the Act, to be perfected as of the date of the Act when the land should be identified and the patent issued as provided by § 2. *Wright* v. *Roseberry*, 121 U. S. 488; *United States* v. *Minnesota*, 270 U. S. 181, 202-203. By its terms the Swamp Lands Act did not include swamp lands which the Government had sold, and it could not include lands which the Government had not acquired or free any of them of obligations to which they were subject when the Act was passed. *United States* v. *Minnesota, supra*, 206.

It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose. *Wilcox* v. *Jackson*, 13 Pet. 498, 513; *Missouri, K. &*

T. R. Co. v. *Roberts*, 152 U. S. 114, 119; *Scott* v. *Carew*, 196 U. S. 100. This has been held to be the case even though the appropriation be afterwards set aside. *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 741, 745; *Newhall* v. *Sanger*, 92 U. S. 761. The general words of the granting act are to be read as subject to such exception. *Scott* v. *Carew, supra*, 111, 112; *Louisiana* v. *Garfield*, 211 U. S. 70, 77; *United States* v. *Minnesota, supra*, 206.

Swamp lands in California, being a part of the territory annexed by the Treaty of Guadalupe Hidalgo, were subject to all obligations imposed upon the United States with respect to them under the principles of international law by reason of the annexation, and by its treaty obligations.[2] Article 8 of the treaty stipulated that Mexicans then established in the annexed territory should retain their property within that area, and that property belonging to Mexicans not established there should be respected. The protocol of May 26, 1848, interpretative of the treaty, which preceded the exchange of ratifications on May 30, 1848, declared that the grants of land made by Mexico in the ceded territory "preserve the legal value which they may possess, and the grantees may cause their legitimate [titles] to be acknowledged before the American tribunals", and that "Conformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories are those which were legitimate titles under the Mexican law in California . . . up to the 13th of May, 1846 . . ." 61st Cong., 1st Sess., Sen. Doc. No. 357, pp. 1119-1120.

The obligations thus assumed by the United States antedated the Swamp Lands Act and were superior to any rights derived from the United States under that act. The obligations were political in character, to be discharged in such manner and upon such terms as the United States might deem expedient in conformity to its treaty obligations. *Beard* v. *Federy*, 3 Wall. 478; *Grisar* v. *McDowell*, 6 Wall. 363, 379; *San Francisco* v. *LeRoy*, 138 U. S. 656;

[2] The obligation imposed by the principles of international law to respect property rights within annexed territory is substantially that recognized by the treaty, Soulard v. United States, 4 Pet. 511; United States v. Percheman, 7 Pet. 51, 87; Strother v. Lucas, 12 Pet. 410, 436; United States v. Repentigny, 5 Wall. 211, 260; Knight v. United States Land Ass'n., 142 U. S. 161, 184, and comprehends not only formal grants "but also any concession, warrant, order or permission to survey, possess or settle, whether evidenced by writing or parol, or presumed from possession". Strother v. Lucas, *supra*, 436; see Soulard v. United States, *supra*.

Knight v. *United States Land Ass'n.*, 142 U. S. 161, 183, 184. While the treaty provided that the claimants under Mexican grants might cause their titles to be acknowledged before American tribunals, it was silent as to the mode of selection or creation of such tribunals. The United States was left free to provide for them in its own way. Cf. *United States* v. *Ferreira*, 13 How. 40, 45. It could relegate all the multitude of claims under the Mexican grants to the ordinary procedure of courts with the inevitable delays and confusion affecting land titles in the vast annexed area. See *Beard* v. *Federy*, *supra*, 493. It could set up an administrative tribunal acting by a more summary procedure[3] designed to establish with finality the status of all the Mexican grants as of the date of annexation. It chose the latter course by the creation of the Board of Land Commissioners, by the Act of March 3, 1851.

Under that Act the General Land Office was required to issue a patent for all claims finally confirmed "by the said commissioners, or by the said District or the Supreme Court". The act declared that final decision of the Board, or the district or the Supreme Court should "be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons." Lands, the claim for which should be finally rejected, and lands, claims to which should not be presented to the Board within two years of the date of the act were to be "deemed, held, and considered as part of the public domain".

The primary purpose of the Mexican Claims Act was the performance by the United States of its treaty obligations to quiet the titles of the claimants under Spanish and Mexican grants. But a necessary consequence of proceeding before the Commission, and one incidental to the determination of the validity of the titles of such claimants, was a determination whether, by the cession, the lands in question had become a part of the public domain of the United States. It is evident that the treaty obligations to quiet the title of claimants under Mexican grants would be defeated and the Mexican Claims Act would fail of its purpose if the finality of the Board's confirmation of claims under Mexican grants could be challenged by persons claiming under grants of public lands by the United States. For that reason it has been consistently held that claimants under the United States, by virtue of statutes disposing of its public lands in California, are not "third persons" within the meaning of the Mexican Claims Act, and that confirma-

[3] As to the number of the claims and the celerity with which they were disposed of, see 8 Op. Atty. Gen. 515.

tion under that act of claims under Mexican grants is conclusive upon all those claiming under the United States. *Beard* v. *Federy, supra,* 493; *More* v. *Steinbach,* 127 U. S. 70; *San Francisco* v. *LeRoy, supra; Knight* v. *United States Land Ass'n., supra,* 184; *Ward* v. *Mulford,* 32 Cal. 365, 370; *People* v. *San Francisco,* 75 Cal. 388, 400; cf. *United States* v. *Coronado Beach Co.,* 255 U. S. 472, 488. Such is the effect of confirmation by the Board of titles set up under Mexican grants, upon claimants under the Swamp Lands Act to lands in the annexed territory. That the Swamp Lands Act antedated the Mexican Claims Act and the confirmation of titles under it, is immaterial; for those claiming under the Swamp Lands Act took *cum onere*—subject to the treaty obligations of the United States and whatever procedure the United States might adopt in performance of those obligations for the quieting of titles under Mexican grants. Confirmation when made was as effective and conclusive upon all patents under the Swamp Lands Act as if made at the date of the treaty. *San Francisco* v. *LeRoy, supra,* 670; *Knight* v. *United States Land Ass'n., supra,* 185; *Ward* v. *Mulford, supra,* 370.

We do not stop to discuss the point, much argued at the Bar and in the briefs, whether the decree of the district court affirming the Board's decree of confirmation was void or otherwise defective because not signed at or about the time it was rendered. See *Mitchell* v. *Overman,* 103 U. S. 62, 64-65; *In re Wight,* 134 U. S. 136; *United States* v. *Stollar,* 180 Fed. 910, 912, 913; *International Harvester Co.* v. *Carlson,* 217 Fed. 736, 738. If it be taken that the Government has failed to prosecute its appeal to final decree in the district court, it is enough that the decree of the Board has never been set aside or otherwise disturbed. If the appeal was not still pending when the decree of the district court was entered *nunc pro tunc* in 1930, the decree of the Board remains as effective as if no appeal had been taken, and has become final and conclusive within the provisions of the Act. *Beard* v. *Federy, supra; United States* v. *Ritchie,* 17 How. 525.

Apart from the considerations growing out of the purchase by the Government of the Bissell and Aspinwall title, now to be discussed, the decree of the Board, if not that of the district court, must be taken as conclusive on respondents, and as to them it is not open to this or any other court to reexamine the existence or validity of the Castro grant.

The holding of the court below that the acquisition by the United States of the title of Bissell and Aspinwall, while their claim was pending before the Board of Land Commissioners, involved a breach of equitable duty to California of such character as to preclude the Government from taking any advantage of the Board's confirmation of the Castro grant, is predicated upon the assumption that by virtue of the Swamp Lands Act the United States became in effect the trustee of the lands in question for the benefit of the state and its successors in interest. It is true that in a loose and general sense the United States, pending issuance of a patent under other land grant acts, has been referred to as a trustee of lands to be patented, *Cornelius* v. *Kessel*, 128 U. S. 456, 460-1; *Benson Mining and Smelting Co.* v. *Alta Mining and Smelting Co.*, 145 U. S. 428, 432; *Orchard* v. *Alexander*, 157 U. S. 372, 383; *United States* v. *Anderson*, 194 U. S. 394; *Knapp* v. *Alexander-Edgar Lumber Co.*, 237 U. S. 162; *Payne* v. *New Mexico*, 255 U. S. 367, and the right of the state, before patent, to lands within the purview of the Swamp Lands Act has been referred to as "equitable". *Michigan Land and Lumber Co.* v. *Rust*, 168 U. S. 589, 591; *Brown* v. *Hitchcock*, 173 U. S. 473, 476.

Even where the right of the state under the Swamp Lands Act is unqualified, it would perhaps be more accurate to say that the United States is no more than a donor granting without warranty those lands falling within the description and the purview of the statute, subject to a duty imposed by the statute, to perfect by survey and patent such inchoate title as it had conveyed to the state. Beyond this the United States, by the enactment of the Swamp Lands Act, assumed no duty. It gave no warranty of title. It assumed no obligations to the grantee subjecting itself to other claims of equitable duty. Sale of the lands to others does not make it accountable as a trustee of the proceeds. *United States* v. *Louisiana*, 127 U. S. 182, 191. In any case, the duty assumed by the United States under the treaty and the concomitant power thus reserved to it, was inconsistent with the assumption of trust duties toward the state by reason of the Swamp Lands Act. In the execution of that duty it was free to adopt any mode of procedure it saw fit for adjudication of the titles of claimants under Mexican grants. Even after the submission of their claims to the Board of Land Commissioners it could withdraw them from decision of the Board and courts and adjudicate them by Congressional action. *Grisar* v. *McDowell*, *supra*, 379. The tentative recognition by the treaty of the rights of

the Mexican grantees and the full latitude which the Government had reserved to itself in the choice of modes of disposition of those claims, were incompatible with the assumption of trust duties by the Government with respect to them pending their final disposition. There is thus a complete absence of support for the supposed analogy between a sovereign government, in such circumstances, and a private grantor who has conveyed with warranty of title or who has undertaken by executory contract to convey title which he possesses or subsequently acquires and who, because he has thus assumed equitable duties, is sometimes spoken of as a trustee.

The Mexican Claims Act itself neither imposed nor recognized such duties. In authorizing the Board to pass on claims presented to it upon the evidence adduced by the claimant and the United States, it required no notice to be given to any third party. It gave to the Government the right to representation by an agent and made it his duty to collect testimony "in behalf of the United States," and to attend meetings of the Board. But the rôle of the Government was not that of a litigant. It was rather, as the Act itself declared, supervisory: "to superintend the interests of the United States" in the performance, through an administrative agency, of its treaty obligation to ascertain for the Mexican claimants, and for itself, what lands had been withdrawn from the public domain by the Mexican grants. "The United States did not appear in the courts as a contentious litigant; but as a great nation, acknowledging their obligation to recognise as valid every authentic title, and soliciting exact information to direct their executive Government to comply with that obligation." *United States* v. *Fossatt*, 21 How. 445, 450, 451.

At no stage of the Government's dealing with the titles under Mexican grants, either under the Swamp Lands Act or under the Mexican Claims Act, can we find the assumption on the part of the Government of any duty toward the state with respect to the swamp and overflowed lands other than that specified in the Swamp Lands Act itself, and that duty was fully performed when it issued to the state its patent to the lands in question in response to the mandate in *Work* v. *United States ex rel. O'Donnell, supra.*

We turn now to the consideration of the circumstances relied on to establish the proposition that the title now asserted by the United States was acquired as the result of a purposeful or conscious scheme to deprive the state of possible benefits under the Swamp Lands Act by means of collusive proceedings before the

Board of Land Commissioners and the district court. At the outset it is to be noted that this contention first emerges in this case in the opinion of the Court of Appeals below. There had previously been no suggestion of such a contention in any pleading or assignment of error, nor had the Government or its officers been charged with any fraud, collusion, concealment, or bad faith. The respondents, in seeking affirmative relief, made no assertion of that character. In such a state of the record, dereliction of officers of the United States in the performance of official duty is not lightly to be inferred seventy-five years after the event, and a court should be slow to find what would be in effect a fraudulent conspiracy on their part to deprive the state of the benefits of the Swamp Lands Act.

Upon the selection of Mare Island as a navy yard by the Secretary of the Navy, Mr. Crittenden, then Attorney General, had given an opinion to the effect that Mare Island was a part of the public domain subject only to the Castro grant, the claim under which was then pending before the Board of Land Commissioners. He concluded that there was sufficient basis for the claim to justify purchase of the claimant's title, which he recommended as a protection of the interests of the Government. See Opinion of Attorney General Cushing given to the Secretary of the Navy, April 9, 1853. 8 Op. Atty. Gen. 422. Then followed the purchase from Bissell and Aspinwall, in the circumstances already detailed. Those circumstances justify no inference that the defense of their claim was dishonest. The Government had far more to gain than to lose by defeating the Castro grant. As the grant covered the island "in all its extent," both upland and swamp, rejection of the claim would not only have given to the Government a return of the purchase price and expenses as guaranteed by its bond for title, but would have established its right to the entire island as a part of the public domain, except perhaps the swamp land. Cf. *Newhall* v. *Sanger, supra.* The validity of the Castro grant was the only matter with respect to which the Board could render a decree which, under the procedure of the Mexican Claims Act, could become final and conclusive as to the claimant and the Government. So far as appears, each was as much concerned with the determination of that question after as before the Bissell and Aspinwall deed and bond, for accordingly as it was decided one way or the other, the one or the other stood to gain an amount equal to the purchase price of the property. The reasonableness of the

purchase price is not challenged. The only effect of the deed and bond was to protect the Government against loss of the opportunity to acquire the land for a navy yard in case the property should be disposed of to some third person pending the Board's decision, and the Castro grant should be upheld.

Upon the opinion of Attorney General Cushing, already mentioned, the Court of Appeals placed its chief, indeed its only reliance for the conclusion that there was conscious dereliction on the part of the Government. In this opinion the Attorney General spoke of the Government's purchase of the Bissell and Aspinwall title as an accomplished fact, but nevertheless recommended that the claim be vigorously contested. This is said to be so inconsistent with the Government's dismissal of its appeal four years later as to indicate a "purposeful shift of position" to the detriment of the state, from which bad faith is to be inferred. But an attentive reading of the opinion in the light of subsequent events reveals no such inconsistency. In repudiating any thought that the claim should not be contested, he declared: "But I, as Attorney General, in view of the special duties imposed on me by the acts for settlement of private land claims in California, and of my general obligation to look after the rights of the United States in the premises, cannot pursue this course. I must not admit that the purchase of the Castro claim by the United States operates in any way, either by implication or otherwise, as a waiver of the general rights of the United States in the premises, or as an assent, either express or implied, to the pretended validity of the grant to Castro". He pointed out that the claim "involves difficult and important questions of law, which the Commissioners, to be sure, have decided in favor of the claimants,[4] but which the Supreme Court may decide otherwise", and that he felt bound to protect the interests of the United States by an appeal because as a precedent the case would affect "many millions worth of land in California, which is otherwise public domain."

After pointing out that the State of California retained title to tide land below high water mark, and that the United States could not enjoy the use of Mare Island as a naval depot while its shores belonged to the state, he concluded with the recommendation that

[4] The reference is obviously to claimants other than Bissell and Aspinwall, for at that time there had been no hearings by the Board on the claim of the latter and the Board had rendered no decision with respect to it.

"California be invited to relinquish to the United States whatever claim, if any, she may have to the shores or the overflowed land of Mare Island." The opinion discloses that he had no thought of depriving the state of any rights which it might have under the Swamp Lands Act for it affirmatively shows that he was of opinion (erroneously as was later decided in *Beard* v. *Federy, supra,* and cases following it), that no rights of California under the Swamp Lands Act would be affected by the decisions of the Board.

With but little research it becomes apparent that the important questions of law affecting "many millions worth of land in California", which were involved in the Bissell and Aspinwall claim and which the Commissioners had already decided in other cases, were unrelated to any rights of the state under the Swamp Lands Act, and were in fact decided against the Government by this Court after the Attorney General had rendered his opinion and before the dismissal of the Government's appeal from the decree of the district court in the Bissell and Aspinwall case.[5] The opinion evidences the strongest motives on the Government's part to contest the Bissell and Aspinwall claim, and the firm determination to prosecute the contest with vigor. The record of the proceedings before the Board plainly shows adherence to this purpose. Witnesses were produced by the Government to discredit the Castro grant; those produced by the claimants, including Alvarado who testified to his execution of the grant, were so vigorously cross-examined as to excite the Board's "strong suspicion" as to the

[5] Of the "difficult and important questions of law" which were said in Attorney General Cushing's opinion to the Secretary of the Navy to be involved in the claim of Bissell and Aspinwall, one, mentioned in the letter itself, was whether a grant by a Mexican governor was valid in the absence of approval by the "Departmental Deputation". This question was answered in the affirmative by the Board, December 27, 1852, in passing on the Fremont claim; January 5, 1853, in the Larkin case; and in preliminary opinions in the Cervantes and Reading cases, rendered August 3, 1852, and August 9, 1852, respectively. This Court agreed with the Board on the general proposition, in Fremont *v.* United States, 17 How. 542, 563 (March 10, 1856); United States *v.* Reading, 18 How. 1, 7-8 (January 11, 1856); United States *v.* Larkin 18 How. 557, 563 (May 12, 1856). A special rule to the contrary was later pronounced as to island grants in United States *v.* Osio, 23 How. 273, decided March 12, 1860, but it cannot be said from the present record whether that rule was applicable to the Castro grant.

Also involved in the claim of Bissell and Aspinwall were five other questions, each of which had been decided by the Board before the Attorney General's opinion of April 9, 1853, and before the Board's later confirmation of the Bissell and Aspinwall claim. Each was decided by this Court against the Government before its dismissal of the appeal which it had taken April 1, 1857, from the district court's affirmance of that confirmation. The questions were:

(a) Whether the Mexican provincial governors had power to grant lands. It was decided in the affirmative in the preliminary opinion on the Cervantes

authenticity of the Castro grant, which it nevertheless sustained in the light of all the evidence. Only after the "important questions of law" had been decided by this Court against the Government did it relax its efforts. Its change of position then, though purposeful, can hardly be said to be evidence of bad purpose.

The deed of Bissell and Aspinwall to the government was recorded in Solano County, California, April 18, 1853. The opinion of Attorney General Cushing was on October 3, 1853 transmitted by the Secretary of the Navy to the Governor of California who submitted it to the California Legislature January 4, 1854. California Senate Journal, 1854, 37; Appendix, Doc. No. 4. Being then fully advised by that opinion of the Government's purchase of the Bissell and Aspinwall claim and of its purpose to press for a determination of the validity of the Castro grant by the Board of Land Commissioners, the California Legislature by Act of May 11, 1854, Cal. Stat. 1854-1855, c. 43, pp. 48-49, consented to the purchase of Mare Island for the purpose of establishing there a navy yard and proclaimed that all the lands within its limits were to be perpetually free of state taxation. It ceded to the Government lands on the island which are not here involved, with the proviso that the consent to the purchase and the cession to the government should not "be construed in aid or support, directly or impliedly, of any conveyance or bond for title to the United States of the same lands

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claim, rendered by the Board August 3, 1852, and in a number of subsequent decisions, and was settled by this Court March 5, 1857, in United States *v.* Peralta, 19 How. 343.

(b) Whether the Mexican governors had power to grant any lands within ten leagues of the seacoast—the so-called littoral league question. It was decided adversely to the Government in a preliminary opinion in the Cervantes case, rendered by the Board August 3, 1852, and was settled by this Court May 12, 1856, in Arguello *v.* United States, 18 How. 539, and United States *v.* Cervantes, 18 How. 553.

(c) Whether the grantee's failure to furnish a map (*diseno*) with his petition for a grant, constitutes a fatal defect in title. It was decided by the Board adversely to the Government in the Fremont case, December 27, 1852, and was settled by this Court March 10, 1855, in Fremont *v.* United States, *supra.*

(d) Whether a grant is void for want of a condition requiring the grantee to take possession of and cultivate the land within a certain time. It was decided by the Board in the negative in the Larkin case, January 3, 1853, and was settled by this Court May 12, 1856, in United States *v.* Larkin, *supra.*

(e) Whether a grant is void for want of a clause informing the grantee that it would become indefeasible only after approval by the Departmental Deputation. It was involved in the Larkin claim, confirmed by the Board January 3, 1853, and was settled by this Court May 12, 1856, in United States *v.* Larkin, *supra.*

Chronological data have been secured from Hoffman's Land Cases, Appendix, and from the records filed in this Court in the cited cases.

heretofore made, or which may hereafter be made . . . or as a recognition on the part of the State of California of any claim, title or grant heretofore asserted or set up, or which may hereafter be asserted or set by any person or persons . . .'' The only bond for title then relating to Mare Island which is disclosed by the record was that of Bissell and Aspinwall, and the apparent purpose of the proviso was that the state's consent to the purchase should not enure to the benefit of Bissell and Aspinwall or any others in like situation, so as to relieve them from the obligation on their bond in the event that the Castro grant should be held invalid by the Board of Land Commissioners. Occupation of the island by the United States as a naval station followed in September, 1854. The Board rendered its decree of confirmation of the Castro grant May 8, 1855. The following memorandum appears among the papers in the case in the district court: ''The United States being now the owner of the titles of appellees, a confirmation of this claim enures to the benefit of the Government and no objection is therefor made to a decree in favor of the validity of the claim.''

Thus, instead of action covertly taken by the Government with the purpose of depriving the state of any of its rights in the premises, we find high officers of the Government proclaiming in documents submitted to the Governor and Legislature of California the fact of the Government's acquisition of a conditional interest in the Bissell and Aspinwall claim, and its purpose to secure a determination of the validity of the grant by the Board of Land Commissioners. We see that, after this full disclosure, the state expressed consent to the purchase in such a way as to save to the Government unimpaired its rights under the Bissell and Aspinwall bond. Only after the confirmation of the Castro grant by the Board of Land Commissioners, and only after the important questions of law on which the Government relied to defeat the grant had been decided against it by this Court in other cases, did the Government relinquish its purpose to contest the Bissell and Aspinwall claim. We can find in this record no basis for saying that the confirmation by the Board was procured or allowed to stand through any fraud, concealment, bad faith, or breach of duty to California by the Government or its officers.

The contention that the decree of the Board is open to collateral attack as a nullity is thus reduced to the assertion that, by reason of the conditional interest of the Government under the Bissell and

Aspinwall deed and bond, the contest before the Board may have been in some degree less vigorous than it otherwise would have been. To this the answer is that, as already shown, the Government owed no duty to the State to contest the claim and that in any case the proceeding before the Board was not adversary.

The Board was an administrative body, created as the Act declares "to ascertain and settle the private Land Claims in the State of California", by proceedings which were not required to be controversial. It was begun without notice to any other party. While the attendance by the "agent" of the United States was required in order that he might "superintend the interests of the United States", it did not appear in the rôle of litigant. *United States* v. *Fossatt, supra.* The Board was an administrative body, not a court. *United States* v. *Ritchie, supra; United States* v. *Fossatt, supra.* Review of its proceedings by direct appeal was not within the judicial power, and reexamination of its determinations by the district court and the United States Supreme Court was sustained only on the theory that the appeal to the district court was the initiation of a suit to set aside the determination of the Board, in the course of which suit further evidence might be taken. *United States* v. *Ritchie, supra,* 533, 534; *Grisar* v. *McDowell, supra,* 375. Since the statute under which the Board was created did not require adversary proceedings, the validity of its administrative determination was unaffected by their absence. The decree of the Board, which stands undisturbed by any subsequent proceedings in the courts, cannot be disregarded as a nullity.

We conclude that the acquisition of the interest in the Bissell and Aspinwall title by the United States did not undermine that determination; that the proceedings in connection with their claim before the Board of Land Commissioners were free from fraud, bad faith, concealment or overreaching, and of any breach of duty to California on the part of the United States or its officers; and that the decree of the Board stands undisturbed as a valid administrative determination of the validity of the Castro grant and, as such, is conclusive upon the State of California and on respondents who claim under her. The decree below must accordingly be

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.